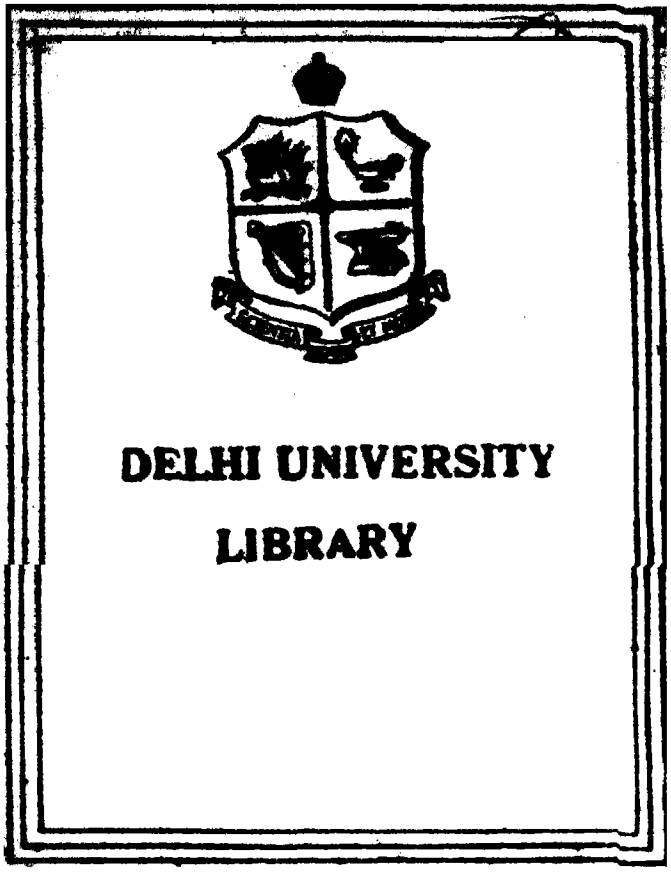

Our Civil Liberties

TO

The American Civil Liberties Union

which has helped me to learn

much of what is here set down

Our Civil Liberties

BY OSMOND K. FRAENKEL

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Foreword

VICE-PRESIDENT WALLACE, in his speech on the occasion of the twenty-fifth anniversary of the Soviet Union, said: "Some in the United States believe that we have overemphasized what might be called political or bill-of-rights democracy." He indicated that there should also be considered economic, ethnic and educational democracy, and democracy in the relations between the sexes. The National Resources Planning Board has developed some of the concepts inherent in economic democracy to be included in a "new bill of rights" and, in his 1944 message to the Congress, President Roosevelt urged the adoption of a "second," an economic, Bill of Rights. While no one will deny the inadequacy of political democracy alone, nor the sterility of a bill of rights functioning in a society which denies economic democracy, it still remains true that a "political" bill of rights is the cornerstone on which the whole structure of a free world rests. Without our right to express opinions through the ballot, the press, and other mediums of distribution, without protection from arbitrary arrests and punishments, without our right to organize and assemble, a tyrant could easily retain power, to be dislodged only by violence. It is important, therefore, that the nature of the guaranties contained in our American Bill of Rights be understood as well as their limitations and the extent to which they have been evaded.

I wish to thank Professor Robert E. Cushman of Cornell University, my daughter Nancy Wechsler, and my wife for having read portions of the manuscript and having made valuable suggestions.

What Are Civil Liberties?

AMID the reverberations of the bombs which fell on Pearl Harbor and in the Philippines, we celebrated the one hundredth and fiftieth anniversary of the adoption of the Bill of Rights. We properly congratulated ourselves on the long continued existence of these guaranties of freedom. Yet we took cognizance of the many failures to achieve the full measure of freedom guaranteed and of the inadequacies of some of the guaranties themselves. Before analyzing the particular guaranties and the manner in which they have been interpreted by the courts, it would be well to examine the basic purposes of the Bill of Rights and to determine how its provisions have been applied to some unusual situations.

The experience of Englishmen with their kings and of the American colonists with English rule led to the adoption of written guaranties designed to protect the individual against the state. Known generally as "bills of rights," these guaranties had been adopted in Virginia, Pennsylvania, and Massachusetts even before independence was won. While varying in language, the colonial provisions were identical in substance and had the same two main objects: to protect free expression of opinion, secular as well as religious, and to prohibit abuses of the criminal laws as practiced by tyrants. Only incidentally did they deal with property rights.

The federal Constitution, although it gave some recognition to the need for protecting those accused of crime, included no bill of rights. This omission resulted from the belief that the projected federal government had only limited powers and consequently would never be able to exercise them so as to invade the fields of opinion. But the public mind found this

reasoning specious and considered even the safeguards provided in criminal cases insufficient. As is well known, ratification of the Constitution was made contingent on the adoption of amendments which should constitute a bill of rights.

A very large number of amendments was proposed and ten, of which the first eight are our concern, were adopted. The first of the amendments guarantees freedom of opinion and expression, both religious and secular. The second and third deal with military problems, such as quartering troops, once thought important, now largely obsolete. The fourth amendment protects one aspect of the right of privacy, the security of the person and the home against unreasonable searches. The fifth and sixth are primarily concerned with criminal prosecutions. They provide that no serious crime shall be prosecuted except upon a grand jury indictment, prohibit a second prosecution for the same offense, guarantee trial by jury and the right to counsel and to confrontation by witnesses. The fifth also states that neither life, liberty, nor property should be taken except by "due process of law." The seventh assures jury trials in civil cases involving more than twenty dollars. The eighth prohibits excessive bail and cruel and unusual punishments. The ninth and tenth amendments reserve to the states and people all powers not expressly conferred on the federal government. All these provisions protect aliens as well as citizens.

In so far as federal power is concerned, the provisions of the first eight amendments and of those few sections of the original Constitution which deal with civil liberties have persisted without change. Note the stress here on "federal" power. With one exception, none of these early civil liberty provisions has application to the states. It was generally supposed that the bills of rights of the various state constitutions would adequately protect the individual against state interference with his liberties. Yet some doubt of this must have existed, because Section 10 of Article I of the United States Constitution specifically prohibits the states from engaging in certain ab-

horrent practices. No explanation appears as to why only these particular weapons in the arsenal of tyranny should have been forbidden to the states. Nor do we know why a proposed amendment which would have made parts of the Bill of Rights applicable to the states was rejected by the Senate.

But this difference between the states and the federal system has not continued unchanged. With the adoption of the Fourteenth Amendment at the close of the Civil War, many of the provisions of the first eight amendments became equally binding on the states. The scope of this comparatively recent change has not yet been fully established. It still remains uncertain, for example, whether the search and seizure guaranties of the Fourth Amendment are binding in state criminal prosecutions.

Another change which came about through the post-Civil War amendments was the injection of a new concept, that of freedom from discrimination. When the Declaration of Independence proclaimed that all men were created "free and equal," slavery was an existing fact which made it impossible to embody such a concept into the Constitution. But after the Civil War, with the abolition of slavery a reality, it became necessary to adopt constitutional guaranties to prevent a resurgence of slavery in any form. While this was expressly accomplished in the Thirteenth Amendment, an uneasy feeling persisted that ways might still be found to negate the Negro's newly won freedom. Accordingly, in the Fourteenth Amendment, the states were denied the right to deprive any one of the "equal protection of the laws." Great as the impact of this prohibition was, it did not, as we shall see, go far enough to eliminate discrimination. For neither the Fourteenth nor the Fifteenth Amendment gives Congress the power to forbid discrimination by private persons. Moreover, the equal protection clause of the Fourteenth Amendment has come to be used in ways which would have astonished its framers. It has been invoked, for example, so as to relieve business interests from regulation and taxation by the state.

The implication of the equal protection clause—that there should be no discrimination on account of race—was made explicit so far as the right to vote is concerned in the Fifteenth Amendment. It forbids both the states and the federal government from depriving any citizen of the right to vote because of his "race, color or previous condition of servitude." And by defining citizenship to include all native-born persons, the Fourteenth Amendment served to implement the Fifteenth. Many devices have been attempted in some of the Southern states to circumvent the purpose of the Fifteenth Amendment by making it difficult if not impossible for Negroes to vote. Although the Supreme Court has prevented some states' efforts to disenfranchise the Negro, the imposition of poll taxes and discrimination against Negroes in primaries of the Democratic Party have survived judicial scrutiny. Since the franchise is the cornerstone of democracy, there can be no rest for those who cherish democracy until these blemishes are removed.

Far-reaching changes have resulted from a provision in the Fourteenth Amendment, the meaning and objective of which have been the subject of constant controversy: the "due process" clause. Such a clause had existed in the Fifth Amendment and is one of the two provisions of the Bill of Rights which expressly protects property rights. (The other provision prohibits the taking of private property for public use without compensation.) The "due process" clause affects equally life, liberty, and property. It was designed to prohibit arbitrary action by government officials, to insure fair procedure, and to give everyone a hearing before he or his property could be condemned. Originally this clause was not designed as a curb on legislative enactments.

Slowly the notion developed that an act of the legislature, though expressive of that body's social policy, might be considered by judges so arbitrary and unreasonable as to constitute a denial of due process to those affected by the statute. This view was expressed before the Civil War in a few cases. But it was not until the later growth of corporate wealth

brought about the passage of regulatory legislation that this concept reached its full expression. By that time the inclusion of the due process clause in the Fourteenth Amendment had made it possible for those who objected to state legislation to carry their complaint all the way to the United States Supreme Court. Thus the action of all state bodies—legislatures, courts and administrative officials—has become subject to federal scrutiny.

The Supreme Court first rejected the idea that state laws might be set aside as "arbitrary," then accepted it without reservation and struck down many progressive measures. Only since President Roosevelt's threat to enlarge the Court, in 1937, has there been a change. And that change rests not on any rejection of the theory of judicial supremacy, but on a more liberal and sensible application of the theory itself.

One salutary and unlooked for by-product has resulted from this expanded meaning of the due process clause. After much hesitation, the Supreme Court has applied the clause to laws affecting personal as well as property rights. In this way the due process clause became the door through which many of the guaranties of the federal Bill of Rights became enforcible in federal courts against state action.

Another part of the Fourteenth Amendment, one which amplified a guaranty contained in the body of the Constitution itself, requires mention here. This is the "privileges and immunities" clause, "stepchild" of the Constitution, to which the Supreme Court has almost always refused to give effective meaning. As originally formulated in the Constitution, it was designed only to prevent a state from denying basic rights to citizens from another state. Then the Fourteenth Amendment expanded it to protect a citizen against acts of his own state as well and added the concept of national citizenship and the privileges of such citizenship. Both these provisions have lost value, however, not only because they have been restricted to those few rights created by the federal Constitution, but also because of the reluctance of most judges to rely on either of

them, even when considering rights clearly federal in origin, such as the right to travel freely from state to state.

There is, finally, a provision of the original Constitution which deals with procedure alone, yet without which much else would be of no avail. This is the clause which prohibits the suspension of the writ of habeas corpus, except in limited emergencies. That writ is the method invented by English legal genius, whereby an individual detained by public authority may test the legality of his detention. It is the most valuable weapon against tyranny that we have, for it prevents persons from being held unless charges are brought against them, it proves useful in proceedings not strictly criminal such as deportations, and it provides the only remedy available against military rule over civilians. In the Second World War habeas corpus was used to test inductions into the army of persons claiming exemption from military service, to question the evacuation and detention of citizens of Japanese ancestry on the West Coast, and, most dramatically though unsuccessfully, to test the right of a military commission to try German saboteurs landed on our shores from an enemy submarine.

The suspension of the writ of habeas corpus during the Civil War led to widespread criticism of President Lincoln. After the war was safely won, the suspension of the writ occasioned one of the landmarks of our constitutional law, the Supreme Court decision in the Milligan case. In that case the Court upheld the supremacy of the Constitution, even in time of war, and condemned military trials of civilians in areas not involved in actual warfare.

It will be noted that the Bill of Rights really falls into two parts. One of these parts deals with rights which affect everyone such as the right to vote, to worship, and to express oneself; the other deals with rights which affect only those caught in the meshes of the criminal law, such as the right to a jury trial, to a fair trial, to the assistance of counsel. These latter guaranties are, however, of importance to everyone. For the first step of the tyrant is to use the criminal law to do away

with the opposition. If there are no guaranties against such abuse, then no one is truly free. While the two classes of guaranties thus are dedicated essentially to the same purpose—protection against tyranny—the differences between them also have significance.

Guaranties against the abuse of the criminal law primarily benefit the individual; guaranties of the broader freedoms more largely benefit society as a whole. That is true even of a right as personal as the right not to be enslaved. The interest of society as a whole in freedom rests on dangers to society, dangers that arise both from a corrupt master class and from a rebellious slave class. Likewise the right of franchise exists chiefly because it is important that there be as broad a reflection of popular opinion as possible and that the danger of dissatisfaction from the disfranchised be at a minimum.

This dominance of social motivation is perhaps most clearly illustrated, although not always recognized, in the guaranty of freedom of speech and of the press. Of this right it may well be said that it is not really the right of the individual to express himself which is guaranteed so much as it is the right of society to hear him. In other words, it is of value and importance to the community as a whole that all points of view be expressed so that they can be weighed and judged. Otherwise the action taken by the community rests on uncertain foundations. Moreover, minorities will support the decisions taken by the majority more readily if they remain free to criticize these decisions and to advocate their own policies.

The essential nature of the guaranties of the Constitution will become clearer if we consider some of the impulses toward liberty and the forces that threaten it. These harmful forces derive in part from the urge to power, in part from the tendency toward uniformity which explains much of human intolerance. For liberty is possible only in a society that is willing to endure non-conformity, that recognizes the value to society of diversity of belief, expressions, and endeavor. But liberty is also the only political form compatible with peace.

When men are not free, they will sooner or later revolt. And fear of revolt breeds tyranny and war.

It must not be supposed that it is easy to be free. There are obstacles other than cupidity and intolerance. Free men will make mistakes which may affront their leaders, mistakes which may tempt them to try short cuts to desired ends. The maxim that the end justifies the means often tempts men of noble aims, but who follows that path is no friend of liberty. For an impairment of the rights of free men begun in a cause designed to increase their freedom will surely end by enslaving them. If it does nothing else, it lessens their own regard for that freedom. From time immemorial mankind has been offered the bait of security as compensation for loss of freedom and has been hooked on the line of slavery. What men must learn is that freedom and security are one and inseparable.

There is no more pernicious doctrine than that so often advanced by persons who themselves have never lacked freedom or known insecurity, that security cannot be won except through loss of freedom. No man is really free who is not safe from fear of starvation; no man is secure whom a tyrant can silence or imprison. The serfs of the Middle Ages had a certain economic security, as indeed Negro slaves had in the South. But the ultimate fate of such a serf or slave depended on the will of his master. He might be sold (with or without the land); he might, with slight limitations, be subjected to arbitrary punishments. Thus his personal security—what we should now call his "liberty"—was limited, if indeed it had any existence. This *liberty* means protection against arbitrary outside domination, whether by an individual or by a group. It implies the right to hold and express one's own views, to join with one's fellows, to participate in group decisions, to receive a fair trial when accused of crime.

A man's power to express himself is also affected by his economic status. Seldom do we find the rich or powerful thus thwarted; often the poor and lowly are harassed when they

seek to express their views. The same is true, though in lesser degree, of the suffrage and the right to a fair trial. He who is an economic helot is but half a man. Equally, if a man lives by his belly alone or if he neglects the bellies of others he surely will engender a tyrant.

Of course, one man's freedom may endanger another's security, and the security of all may lessen the freedom of many. In time of war, for instance, conscription restricts the freedom of all able-bodied men in the interest of the safety of society as a whole. And in time of peace the buccaneer in business may destroy his competitor, even as the gangster terrorizes his victims. These disturbances of the balance between freedom and security can be redressed only by wise statecraft that lessens the possibility of war between nations or conflicts between groups in the community.

In the search for the requisite balance we shall encounter numerous obstacles, some of which require separate consideration. There is intolerance, sponsored by bigots who want to bend the spirit of man to the acceptance of a single dogma, be it religious, economic, or the notion of the superiority of a particular race. There is war, sometimes worshiped as a high end in itself, more often the result of weakness and cupidity. There is indifference, a growth accompanying excessive concern for private advantage. And there is the very human instinct of cruelty. We all have experienced the sadism of persons exercising power: the head of a family, the judge on the bench, the jailer in prison, the officer in the army.

To mitigate some of these disturbing forces was the aim of the framers of the Bill of Rights and the post-Civil War amendments. The success of that endeavor has depended in large measure on the concern for freedom shown in each generation by the people and their chosen officials, especially by the judges. We must take care, however, not to blame the judges alone for their many deviations from the ideal of freedom. Only a society which understands the value of freedom will secure it. If the people forsake freedom for the golden calf,

they can hardly blame their rulers or judges for veering away from the Promised Land.

We come back, then, to first principles. Civil liberties are the formulas free people have devised as guides. They presuppose that a society is best governed with the consent of the people, that it is richest if the various capacities of those people are allowed to develop according to their own natures. This means that minorities must be respected because thus they will readily accept the decisions of the majority and so preserve the peace, and because thus they can make a fruitful contribution to the universal good. Hence divergent opinions must be listened to; if the advocates of strange doctrines are suppressed, they may turn to force rather than persuasion as a weapon. Besides, strange doctrine sometimes turns out to be true doctrine.

But it will be asked whether those in power are to sit idly by while their authority is undermined by dissenters. Indeed they will not do so, whatever advocates of liberty may preach. Yet of this, perhaps, they can be persuaded: that no one ever kept power forever, and that most of those who tried to hold it too long were destroyed. A due regard for the liberty of others may still prove the best method of retaining power. At any rate, whatever may be the attitude of those who exercise power, it is surely the duty of students and teachers, of any who claim the right to influence the thinking of others, to preach endlessly the doctrine that liberty and security are one and indivisible and the greater of these is liberty.

Even the rights of persons accused of crime must be respected. Here is one of the most difficult problems for the executive. He must not let his eagerness to suppress crime or his conviction that particular individuals are wicked men blind him to the necessity for securing to them, too, the various rights guaranteed by the Constitution. Otherwise the rights themselves will be impaired, to the hurt of everyone. And what a "good" ruler may do only to the criminal, a "bad" ruler will be quick to do to all.

CHAPTER II

Shall Civil Liberties Be Denied to Those Who Reject Them?

THE proposition that those who aim to destroy democracy should be denied its privileges has a potent emotional basis. A good deal of force lies in the argument that it is hypocrisy for such persons or groups to claim the right to civil liberties. Yet that attitude, wide in its appeal, ignores the fundamental fact that democracy's privileges are conferred on individuals not primarily for their own benefit, but for the benefit of the whole community. We do not tolerate free speech for particular groups or individuals because we care about giving them, as such, any rights at all, but because we know that free discussion of public issues is essential to a free people. It is from the latter point of view that the problem of anti-democratic groups must be considered.

We must realize, of course, that the proponents of repressive measures do not take their own thesis literally. How many of them, for example, would have the state kill off those who advocate fascist doctrine or even put them into concentration camps? Without doubt they would even accord the enemies of democracy many of the privileges of the Bill of Rights such as the right to a fair trial. In the main, it is the privileges of the First Amendment, the rights of free speech and assemblage, which they would deny to these enemies.

Such proponents do not demand a general denial of all right of free speech and assemblage to persons who advocate dictatorship. Surely a pro-dictator would still be allowed to talk on "non-controversial" subjects, even in public. No one would urge that he be punished for lecturing on the female characters in Shakespeare's plays or the policies of Robespierre.

He might even be permitted to discuss slavery before the Civil War or Woodrow Wilson's Fourteen Points. It is also possible that we could agree that advocates of dictatorship might discuss "controversial" subjects such as the New Deal and might form organizations to keep down taxes or amend the Wagner Act.

Those who want to restrict the privileges of fascists and other advocates of dictatorship really mean that they should not have the right to preach the advantages of a dictatorship, or the right to organize societies for the achievement of a dictatorship. Since existing laws already prohibit both the advocacy of the forcible overthrow of the government and the formation of organizations directed to that end, the proponents of new restrictions probably intend that all advocacy of dictatorship should be banned, even if only peaceful means are planned for gaining it. It is doubtful indeed that such a law would be upheld by the Supreme Court. However, let us consider how it might work in practice. Our experience under the laws now in existence, known generally as the criminal anarchy or criminal syndicalism laws, should give some indication of how new ones might work. Occasionally a prominent left-wing representative has been convicted. No pro-fascist has been prosecuted under any of these laws.

For instance, in 1920 New York prosecuted Benjamin Gitlow, author of *Left Wing Manifesto,* a paper which antedated the formation in this country of the Communist Party. Justices Holmes and Brandeis dissented from the decision, which upheld Gitlow's conviction, on the ground that there was no "clear and present danger" that serious harm to the state could result from the generalities contained in that manifesto. Justice Holmes said:

> If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

Other states enacted laws similar to New York's in the troubled times that followed the First World War, fearful no doubt of the contagious effects of the Russian Revolution. These laws have been used largely to punish advocates of various unpopular causes such as persons active in strikes and in demonstrations of the unemployed. Rarely has anyone been prosecuted for clear and direct advocacy of forcible overthrow of the government.

During the post-war hysteria, the New York Assembly actually unseated five elected members because they were Socialists. Charles Evans Hughes, later Chief Justice of the United States Supreme Court, in defending the five expelled Socialists, said:

> Are Socialists, unconvicted of crime, to be denied the ballot? If Socialists are permitted to vote, are they not permitted to vote for their own candidates? If their candidates are elected and are men against whom, as individuals, charges of disqualifying offenses cannot be laid, are they not entitled to their seats? . . .
>
> I understand that it is said that the Socialists constitute a combination to overthrow the Government. The answer is plain. If public officers or private citizens have any evidence that any individuals, or group of individuals, are plotting revolution and seeking by violent measures to change our Government, let the evidence be laid before the proper authorities and swift action be taken for the protection of the community. Let every resource of inquiry, of pursuit, of prosecution be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed, not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies.

Governor Alfred E. Smith, who vetoed repressive laws pro-

posed in that post-war period, expressed himself in words which will always be worth remembering:

> —the safety of this government and its institutions rests upon the reasoned and devoted loyalty of its people. It does not need for its defense a system of intellectual tyranny which, in the endeavor to choke error by force, must of necessity crush truth as well.

The notion that such repressive laws can effectively stop agitation was eloquently refuted by Justice Brandeis in the case of Whitney v. California:

> But they [those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

In spite of what our greatest leaders have said, laws of this kind continue to be misused. One instance in point is the Boloff case in Oregon, where an illiterate sewer digger was sentenced to ten years in prison because he had joined the Communist Party. Again in Oregon, Dirk De Jonge was sentenced to seven years' imprisonment for speaking at a meeting held under Communist auspices. Fortunately this was too much even for the conservatives in the United States Supreme Court. Speaking for a unanimous Court, Chief Justice Hughes said:

> These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people

through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.

If these criminal syndicalism laws, reasonable on their face, have been so gravely misused, is there not basis for the fear that additional restrictions would be even more seriously misapplied? What a weapon laws that are even more rigid would be in the hands of reactionaries! How easy it would become to suppress free discussion of any unpopular subject merely by arguing that the speakers were advocating changes "hostile" to democracy! At least, under criminal syndicalism laws, proof is required that force and violence were actually advocated. Under the laws contemplated by proponents of further restriction, persons could be punished for saying anything which

some judge and jury might think could result in ultimate dictatorship! The belief that prosecutors would seek out only self-confessed, known advocates of dictatorship is negated by all experience. No one would feel free to advocate far-reaching changes for fear of prosecution under such a law.

Every important reform has been attacked as subversive. In Scotland those who urged universal suffrage early in the nineteenth century were so characterized in a judicial decision. President Roosevelt, it may be remembered, was accused of promoting a dictatorship in his Supreme Court and reorganization bills. The danger of denying the privileges of the Bill of Rights to those who advocate dictatorship was recognized in 1943 by the Criminal Court of Appeals of Oklahoma when it reversed convictions of several Communists under that state's criminal syndicalism law:

> It is strange indeed that there might be those who seek to overthrow our existing government which guarantees these freedoms and attempt to transform this republic into one where the word of the dictator becomes the law of the land, and then when he is caught practicing these subversive doctrines presents as his defense the very liberties which he would destroy. But if we were to deny to one of these any of the guaranties provided by our Constitution it would establish a precedent that might in the future cause the arrest and confinement of thousands of our citizens and would more surely result in a violent revolution and overthrowing of our government than these alleged statements of a puny few.

What reasons are given for running all these risks? We are told that we should profit from the lesson of Germany and that unless we curb the advocates of dictatorship here they will prevail as they did there. There is no doubt that much of the experience of pre-Hitler Germany should serve as a warning to us, but it is a superficial reading of that experience which attributes Hitler's rise to power to the failure of the Republic to suppress him. The Republic was lax in permitting private

armies of thugs and gangsters to get out of hand; its judges, indeed, often favored the Nazis. But gangsters and thugs hardly could have thrived had it not been for the conditions in which they grew. Germany was for fifteen years especially fertile soil for subversive propaganda. Every act of the Republic was associated in the popular mind with the infamous and repressive Treaty of Versailles. Hitler exploited the strong nationalist and militarist feeling of the people, which this unpopular treaty had encouraged. Moreover, the economic situation had become progressively worse. The inflation of 1923 impoverished large sections of the middle class; the depression of 1929 completed the process. As Professor Schuman said in his book, *The Nazi Dictatorship:*

> The progressive economic deprivations of the lower middle class after 1929 constituted the decisive factor in creating a mass market for the brand of salvation peddled by the drummers of the NSDAP [Nazi Party].

Dictators do not develop in a vacuum and surely we do not need to be reminded of the economic causes of the dictatorships in Germany and Italy. In Czarist Russia suppression of opinion proved powerless to prevent revolution and dictatorship when the pressure on the people became heavy enough. It is the ineffectiveness of government in the economic field and in preserving public order, not its failure to suppress strident advocates of change, that undermines its strength and makes the time ripe for revolution. It was so in France in the eighteenth century, in Russia and Germany in the twentieth. Put men to work and the advocates of dictatorship will have few hearers. Permit men to starve and the strong man will appear, no matter how many of his advocates have been sent to jail for prophesying his approach. Calvin Hoover writes in *Dictators and Democracies:*

> . . . the ability of democratic and parliamentary institutions to survive depends primarily upon whether or not economic depressions can be overcome within the limits of these institutions.

Let us not therefore waste our energies by attempting to suppress advocacy of opinion, however hateful that opinion may be to us. Let us concentrate, instead, on the removal of those features of our national life which produce the conditions that encourage such advocacy. Suppression of what we dislike results inevitably in the accompanying suppression of much that we love and live by. It solves no problems. Suppression can only hasten the day of possible overthrow, because it increases resentment against authority. A government which to hide its failures jails those who protest deserves to fall. One of the great virtues of the administration of Franklin D. Roosevelt has been its recognition of the need for both economic reform and the preservation of civil liberties.

Problems somewhat different in their nature are presented by group-defamation. Our libel and slander laws generally suffice to protect individuals, but no provision exists for a civil or criminal action by a group for defamatory words. Legally it is even doubtful whether criminal libel laws may be invoked by groups at all. There are several reasons for this limitation. In the first place, defamation of an individual hardly ever involves the expression of a general opinion; defamation of a group almost always does. Thus the ordinary law of libel and slander affects freedom of opinion but little; to extend that law to group defamation might restrict such freedom of opinion considerably. In the second place, when an individual complains of a defamatory statement he knows the risks he is running in starting suit. The situation of a group is quite different. Who is to determine whether it is wise to meet the publicity attendant upon a libel case where an entire group is involved? As many an individual libel plaintiff has learned, a lawsuit is often more damaging than the original libel. Hard as it sometimes is to establish the truth about an individual reputation, it will be so much the harder to prove it about a group. The notion that the law courts are the most efficient instruments for demonstrating the falsehood of defamatory statements is naïve. In cases which aroused mass prejudice the

courts have not shown such a record for justice done as to warrant the belief that their help provides the best protection against defamation.

Whatever may be the solution of the problem of group libel, there seems little doubt that elaborate laws designed to punish utterances which cause "hostility" toward particular groups are undesirable. Such a law was enacted in New Jersey and was once invoked against the witnesses of Jehovah because they had circulated pamphlets criticizing the Catholic Church. The law was not tested on that occasion because the prosecution was dropped. Later the law was applied to certain Nazi sympathizers and held unconstitutional on the ground of its vagueness. The trouble with laws such as these is that it is impossible to draw any lines between legitimate expression of opinion and the advocacy of views which lead to the hatred of others because of their religion or race. All strong feelings on religious or racial subjects are certain to be interpreted as inciting to hate or hostility. It is better to suffer some of the unpleasant literature which has been widely distributed than to encourage the curtailing of free expression.

This does not mean we should sit idly by and do nothing to avert the possibility of dictatorship. We should put down all violence and all incitement to violence energetically. We should oppose the formation of private armies and any drilling whatsoever by unauthorized groups. A bill to punish such intimidating activities was at one time introduced in Congress by Representative Hamilton Fish, and New York has recently passed such a law. Bills to the same end should be introduced in all the state legislatures and should be not only enacted but also enforced. Also, it is proper to prohibit the use of uniforms for purposes of propaganda.

Active steps should be taken, in addition, to combat propaganda with propaganda. One way to do this might be to compel radio stations to set aside desirable time, at only a nominal fee, for the discussion of public issues. Another way might be to require anyone who buys time for the discussion of con-

troversial issues to pay for equal time for the presentation of opposing views. Various methods should be developed for combating some of the doctrines spread by destructive and discriminatory leaflets and newspapers. But always the fight must be waged in such a way as to preserve the essential democratic rights for all. Otherwise the bars will soon be let down and these rights will themselves disappear to our eternal loss.

Our real problem is to preserve democracy by making it work more fully, not by impairing its valuable attributes of free speech and free assembly. Repression of the expression of opinion will never save democracy; it will eventually undermine it. Only truth can fight falsehood; repression breeds martyrs, neurotics, and criminals—in short, the dictator type.

CHAPTER III

Civil Liberties in Wartime

SINCE modern war occasions vast alteration in civil life, it is not strange that the prosecution of war tends to restrict civil liberties. Indeed, many people opposed our participation in the Second World War on the ground that in our attempt to save democracy abroad we might well lose it at home. While the actual events which followed the outbreak of that war showed that fear to have been unfounded, it remains true that war does result in impairment of liberty. It is inevitable that this should be so, since military necessities do not brook the delay characteristic of the ordinary deliberations of civil life. In many cases war cannot permit the publicity deemed essential to a just functioning of the ordinary processes of law. Moreover, since decisions must be made and carried out swiftly, many chafe at a continuation of that variety of opinion and objective which enriches and informs our society in ordinary times. Consequently, during a war we find ourselves confronted with far-reaching restrictions on freedom of action and expression.

While the nature of these restrictions is determined in the first instance by the President and Congress and by those charged by them with the war's conduct, the ultimate approval of the restrictions rests, in our American system, with the people and the judiciary. It rests with the people because their great power of protest is always sufficient to reverse illiberal trends; it also rests with the judges because they have the final word on constitutional power. It is important to remember that the provisions of the Constitution do continue throughout the war, no matter how their application may vary with the pressure of war's emergencies.

Before discussing the various problems which have actually arisen in wartime, it would be well to contrast two statements of Supreme Court justices. In 1866 Mr. Justice Davis wrote, in the famous Milligan case:

> Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

In 1931 Mr. Justice Sutherland said, in the pacifist citizenship case:

> To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

Can these statements be reconciled? What guaranties of the Constitution do withstand the demands of war?

Personal Freedom

All the provisions of the Constitution which protect personal freedom continue in spite of war. A person charged with crime is still entitled to trial by jury, to representation by counsel, to confrontation by the witnesses against him. He is also entitled to protection against compulsory self-incrimination and against unreasonable searches and seizures.

However, a person can be forced into the army and perhaps into civil employment as well. Conscientious scruples against war do not entitle anyone to exemption from service as a matter of constitutional right. Existing exemptions stem from Congressional favor alone. Anyone can be excluded from areas which the army wants to use for military operations. The army claims the right also to exclude citizens from any area in which it believes their presence dangerous. On the West Coast General DeWitt imposed curfew regulations early in 1942 on persons of Japanese ancestry, citizens and aliens alike, and ordered all of them to be evacuated from the entire coastal area without giving anyone an opportunity to establish his loyalty, even before military boards. These persons were then detained in camps, although over a period of time many of them were released. Individuals of other racial origins were ordered out of particular areas on both the West and the East Coasts. In these cases hearings were held before military boards, but under circumstances which often made it difficult for the suspect to prove his loyalty. Persons so removed, however, were not detained in camps; they were free to choose their own places of residence outside of the military area.

The action of the military in regard to citizens of Japanese ancestry was generally sustained. The courts refused to consider whether military necessity required action as drastic as that taken or whether the particular individual who sought relief in the courts was really dangerous. In June 1943 the

United States Supreme Court unanimously held that the curfew regulations were valid. Chief Justice Stone said in the Hirabayashi case that the power to wage war was "the power to wage war successfully," that this power extended to everything which substantially affects the war and its progress, and that the military authorities were justified in imposing regulations such as a curfew when they thought it necessary to do so as a defense measure. The Chief Justice said that the only question for the Court to consider was whether there was "any substantial basis for the conclusion . . . that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion."

With regard to the contention raised on behalf of the defendant that the curfew regulation was void because it embraced only citizens of Japanese ancestry, the Chief Justice pointed out that the only alternative would have been either to impose a curfew on everyone or to impose none at all. He did not think that the government was, in time of war, so powerless or that the Constitution compelled so hard a choice.

Mr. Justice Douglas, concurring in a separate opinion, said that he believed it was necessary to concede "that the army had the power to deal temporarily with these people on a group basis." He suggested that while the orders were valid when made and must be obeyed, the present loyalty of the persons affected might be tested by habeas corpus proceedings. Mr. Justice Rutledge also concurred separately, intimating that some of the language of the majority opinion was too broad since there might be occasions on which the Court should determine for itself whether the military authorities exercised proper discretion. Justice Murphy expressed the view that the case went "to the very brink of constitutional power."

The Hirabayashi case also involved the more important issue of the right of the military to evacuate persons of Japanese ancestry from the West Coast. Although that had been

fully argued, it was not decided by the Court because the sentence imposed on the defendant for the violation of the evacuation order was the same as the sentence imposed for his violation of the curfew order. The Court, therefore, expressed no opinion on the issue of evacuation.

Since that decision was handed down, Judge Ganey in Philadelphia has held void a military exclusion order directed to a naturalized citizen of German origin. He ruled that the military could interfere with the freedom of citizens only if danger to the government was "real, impending and imminent," and that no evidence had been adduced to show the existence of such danger. Judge Ford in Boston reached the same conclusion, but Judge Hollzer in Los Angeles upheld an evacuation order issued by the West Coast command.

Late in 1943 the Circuit Court of Appeals in San Francisco applied the Hirabayashi decision to a citizen of Japanese descent who challenged evacuation. The majority of the court thought the Supreme Court's decision so completely covered evacuation as well as curfew that there was no need to discuss the former separately. Judge Denman, however, rested his concurrence with the majority on the ground that at the time in question there was a basis for the military decision to evacuate and that the courts should not look any further than the existence of such a reasonable basis. The Supreme Court of the United States was asked to review the case.

None of these cases, however, throws light on the validity of the detention of citizens by military authority. So long as the writ of habeas corpus is not suspended, the courts will inquire into the legality of any detention. Cases challenging such detention arose both on the West Coast and in Hawaii. In Hawaii numerous citizens, some of German ancestry, were detained by the military authorities after Pearl Harbor without any charges whatever being preferred against them. On the West Coast most of the evacuated Japanese were likewise so detained, although later regulations permitted their withdrawal under certain conditions to other localities. In the absence of

express Congressional authority for detention of citizens, the courts should hold such detentions illegal. On the other hand, it is not so clearly established that a law granting the President discretion to detain citizens in time of war would be declared unconstitutional. In England the courts have upheld detention on the mere demand of the Home Secretary. But authority to make such detention was expressly given by Parliament and the English courts have never declared an Act of Parliament void. In all these cases the question also arises whether there was a fair hearing on the question of loyalty.

The important practical question in these detention cases does not involve so much the general legality of a detention order but the legal right to detain a particular individual. In other words, will the courts review the grounds of detention? Will they even require a disclosure of these grounds? In England the answer has been in the negative. It is enough for the authorities to certify their belief that detention was in the public interest. In the United States it is not likely that the courts will permit a citizen to be deprived of his liberty without some specification of the reasons for the detention and without a hearing at which he can try to establish that the charges made against him are false. There are still unresolved problems: whether such a hearing must be a judicial one, whether a civilian or military board may make the inquiry into the facts, and whether the sources of the evidence relied on must be disclosed with the accused citizen having an opportunity to cross-examine witnesses.

There is a tendency for those exercising broad governmental powers to refuse to disclose the sources of the information on the basis of which they proceed. That was true in the past in cases involving applicants for employment, dismissal of employees already in service, exclusion and deportation of aliens. It has been extended to cases involving the evacuation of citizens from military areas. The argument is that disclosure of sources would not be in the public interest, that it would discourage witnesses from giving information in other

cases and permit reprisals against them. Nevertheless, it is evident that if important rights and liberties are in question, the citizen needs the opportunity to prove that the witnesses against him are lying. Frequently he can do this only by showing that they are motivated by malice; obviously he is helpless unless he knows who they are.

On at least one occasion the Supreme Court expressed disapproval of this practice. Kwock Jan Fat, an American-born Chinese, upon his return to this country from abroad, was excluded by the immigration authorities on the basis of evidence that he was not the person he claimed to be. An immigration inspector made a report in which he referred to information obtained from a source which was kept secret. Mr. Justice Clarke characterized this report as "remarkable" and stressed the importance of conducting inquiries of such a character "not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race." We may hope that these words will be heeded when the problems arising out of war are tested on writs of habeas corpus.

Under authorization from Congress, the writ of habeas corpus may be suspended, but the Constitution permits this only in case of invasion or rebellion. Can fear of invasion justify such action? In the case of Hans Zimmerman, a naturalized citizen detained by military authority in Hawaii, the Circuit Court of Appeals upheld the denial of the writ. The Governor of Hawaii had suspended the writ of habeas corpus after the bombardment of Pearl Harbor. The organic law of Hawaii permits the suspension of the writ "in case of invasion or imminent danger thereof." The majority of the court refused to consider whether the danger of invasion, which clearly existed when the writ was suspended, continued down to the time of the hearing in the spring of 1942. Judge Haney dissented and expressed the view that it was incumbent on the

military authorities to justify their detention of Zimmerman by a showing of military necessity; therefore, he said, Judge Metzger should have issued the writ in Hawaii and ascertained the reasons for the detention. After papers were filed in the United States Supreme Court, but before that body had time to act on them, the military authorities removed Zimmerman from Hawaii and released him in San Francisco. The case then became moot.

Early in 1943 the military allowed the Hawaiian civil courts to function fully again but continued its ban on the issuance of writs of habeas corpus. Judge Metzger then ruled that the suspension of the writ ceased to be effective. The commanding general ignored the order which the judge issued, repeated the ban on the issuance of the writ, and defied the contempt adjudication and $5000 fine which the judge imposed. The threatened impasse was solved by the removal of most of the interned citizens from Hawaii to the mainland where they were all released. The commanding general then removed the ban on the issuance of habeas corpus writs, the judge reduced the fine to $100, and the President pardoned the general. Thus the supremacy of civil authority was vindicated. But the citizens originally interned in Hawaii will probably be unable to get back to Hawaii so long as the war lasts because the military control all movements to and from that island.

In considering the subject of military power over civilians, we should bear in mind that the writ of habeas corpus is often but not necessarily suspended when martial law is declared and military tribunals function. Military tribunals may function although there is no martial law and habeas corpus has not been suspended. Martial law may exist without there being any necessity either for the suspension of the writ of habeas corpus or for the trial of civilians by military tribunals. The writ of habeas corpus may be suspended without the functioning of military tribunals or the declaration of martial law.

The first situation existed in the summer of 1942 when a

military tribunal in Washington tried eight Nazis, two of them naturalized American citizens, who had been landed on our shores from German submarines. At that time the ordinary criminal courts were functioning and the army lawyers appointed to defend these men claimed they should have been tried in court and not before a military commission. The Supreme Court, convoked in extraordinary session, unanimously rejected that contention. Chief Justice Stone pointed out that these eight men had entered the country surreptitiously as part of the enemy's armed forces and were therefore subject to military law. Since they had discarded their uniforms they were to be treated not as prisoners of war but as spies. It was therefore immaterial that the ordinary courts were functioning and that martial law had not been declared.

The second situation in which martial law is declared while the courts still function develops most frequently during the course of labor disputes. The courts have shown themselves reluctant to review the justification for such declarations of martial law. But in 1932 the Supreme Court showed a different attitude when the question arose, not in a labor dispute, but in a property case. It reviewed the action of a Texas governor in calling out troops to assist in the enforcement of oil regulation laws and held that the courts were charged with the duty of determining whether a declaration of martial law was justified.

The last situation, involving suspension of habeas corpus alone, could develop in the case of an invasion which would justify the arrest and temporary detention of many citizens suspected of planning to aid the enemy. It might then be necessary to suspend habeas corpus within a much larger area than that immediately affected by the invasion where martial law might be called for. In other words, it is important in considering the extent of military intervention to keep separately in mind the three chief methods used—suspension of habeas corpus, martial law, and military trials—and to consider each in the light of the ends to be accomplished.

Once the writ of habeas corpus is validly suspended, there is no doubt that the authorities, whether civil or military, may detain anyone. Even then a person tried in the ordinary criminal courts could, by appeal, challenge the violation of any of his basic rights. Since Congress, however, has not provided for an appeal to the judiciary from decisions of military tribunals, the military authorities might try anyone if the writ of habeas corpus is suspended, and inflict punishment without judicial review. No such drastic step has been taken since the Civil War.

During the Civil War President Lincoln suspended the writ of habeas corpus in the belief that this action was necessary in order to permit the apprehension of "Copperheads" who spread disloyal propaganda and acted on behalf of the Confederacy in Ohio, Indiana, and other places. Thousands of persons were arrested and imprisoned by the military authorities. The legality of such action was challenged by Chief Justice Taney of the United States Supreme Court while acting as a judge on circuit. In the Merryman case he held that Congress alone had the power to suspend the writ of habeas corpus. The full Supreme Court never passed on the point for when it was presented in the case of Clement L. Vallandigham, most notorious of the Copperheads who had been sentenced to imprisonment for the duration of the war, the Court avoided a decision on the merits of the case and threw out the petition for habeas corpus because it was presented in the first instance to the Supreme Court, not to a lower court.

Congress finally passed a law which authorized the suspension of the writ and the detention of suspected persons under limited conditions. Under that law detained persons not indicted before the close of the next session of the grand jury were to be released. But the military authorities continued to hold suspects, to try them, and to inflict punishment upon them, although the ordinary civil and criminal courts were functioning. The Supreme Court decided in the Milligan case, after the Civil War was safely won, that the military had

no right to do this. Although all the judges agreed that the military tribunal had no power to try the accused, the judges differed sharply in their reasons. Five judges, headed by Justice Davis, concluded that Congress had no power at all to authorize military trials for civilians outside a theater of war; the remaining four, led by Chief Justice Chase, believed that Congress had such power but had not exercised it.

Nevertheless, trial of offenders by military tribunals is possible without the suspension of the writ of habeas corpus. In the case of persons in our own armed services there can be no doubt about the propriety of military trials for all offenses. As decided in the saboteur case, enemy offenders may be tried by military courts when, by discarding their uniforms, they have in effect become spies.

On the other hand, in the absence of a declaration of martial law, there is little doubt that a civilian cannot be tried by a military court. So much, we have seen, was decided by the Milligan case. While that was a 5–4 decision, its basic principle was not questioned in the Nazi saboteur opinion.

But so long as the civilian courts function there can be no trial by military tribunal for ordinary crimes. Does the situation change with the declaration of martial law? There is as yet no precise answer to this question. The declaration of martial law generally presupposes such a state of disorder that it becomes impossible for the ordinary courts to function. When that is the situation the military have complete control and can punish anyone for infraction of a military order, even though the act punished be an ordinary crime and unrelated to military affairs. It is obvious that this must be so when martial law has been declared because some great calamity, such as a flood or an earthquake, has completely disrupted a community. It is less obvious when the cause of disruption is a labor controversy and the disorder is limited to some small area. With the ordinary courts functioning as usual, the power of the military to try offenders should be strictly limited to acts which grow out of the particular disorder.

In time of war martial law is sometimes declared in a community where there is no actual disorder at all and where the ordinary courts could function without interference by the military. In such a situation there seems no justification for military trials of civilians, and it seems evident that such procedure would not be approved by the Supreme Court today, any more than it was after the Civil War in the Milligan case. The situation has been similar in Hawaii in 1942 and 1943, except that the organic law of that territory expressly authorizes a declaration of martial law in case of imminent danger of invasion; hence the doctrine of the Milligan case may be held inapplicable. The better view would be, however, that civilians should not be tried by the military while there is no actual invasion and the civilian courts continue to function. Military necessity may require the temporary detention of persons reasonably suspected of being in league with the enemy. It does not require the abrogation of constitutional guaranties in the trial of persons accused of crime.

Unquestionably the rights of individuals are seriously affected in time of war. But the constitutional provisions designed to afford a fair hearing and to prevent oppressive punishments continue unimpaired, except when members of the armed forces or enemy spies are involved, or when actual physical disturbance prevents the ordinary courts from functioning.

Freedom of Expression

In the realm of opinion the impact of war is quite different. While the provisions of the First Amendment which guarantee freedom of speech and of the press are not suspended, their meaning depends on the circumstances in which they are applied. Clearly the existence of war is a circumstance of the highest importance. In certain respects freedom of speech and of the press must be subject to absolute curbs on account of war. No one would challenge the right of the government to forbid statements which might convey information of value

to the enemy. Censorship of all news of military importance thus becomes inevitable and proper.

In both world wars there was an extensive censorship over all dissemination of information and opinion to foreign countries. That information of military value should not be allowed to go out of the country is beyond question. But censorship reached into the field of morale. All sorts of things which might reflect unfavorably on this country or arouse criticism abroad were barred. No news was permitted to go abroad concerning the poll tax debates or lynchings. American criticism of England's handling of India was kept from English eyes. Mr. Willkie's criticisms of imperialism were likewise bottled up. The justification of such censorship was that if these matters got abroad they would be used to our disadvantage by the enemy. But the enemy obtained the information anyway. There seems to be no valid justification for censorship of this character.

In time of war or expectation of war there is a widespread tendency to impose uniformity of opinion on the country. Persons who have expressed hostility to the war or its aims are considered disloyal. Attempts are made to silence them. These vary in form: sometimes executive action suppresses meetings or newspapers; sometimes the post office bans material from the mails; sometimes the offenders are haled into court on criminal charges. In all such cases the question arises whether freedom of speech or of the press has been violated.

This particular issue first arose shortly after the adoption of the Constitution. Excitement over the French Revolution and fear of embroilment in the ensuing war between England and France led to the enactment by Congress of the Alien and Sedition laws of 1798. John Adams' administration prosecuted many editors for sedition because of their acrid criticisms of Federalist policies. The partisan nature of these prosecutions and the biased attitude of many of the judges who presided over them caused a great popular outburst which resulted in Adams' defeat and the election of Jefferson. As Jefferson

considered legislation of this kind unconstitutional, he pardoned those who had been convicted. In consequence no case ever reached the United States Supreme Court in which the issue of constitutionality could be tested.

During the Civil War no comparable legislation was passed and no criminal prosecutions were conducted on account of expressions of opinion. Yet on numerous occasions newspapers were suppressed by military order. In June 1863 General Burnside closed down both the *Chicago Times* and the *New York World* because they published material he believed to be helping the Confederacy. President Lincoln immediately revoked the orders. A year later Secretary of War Stanton ordered General Dix to seize the plants of the *New York World* and the *New York Journal of Commerce* because those papers had printed a proclamation attributed to the President, calling out more troops, which was in fact a forgery. Here again the President restored the plants to the publishers within a few days. But when Governor Seymour of New York instigated a grand jury investigation which resulted in the arrest of General Dix (though not his imprisonment), the President ordered the general not to let himself be relieved of his command. As the grand jury refused to indict, the threatened conflict between state and federal power never came to a head.

During the First World War Congress enacted the Espionage Act which punished those who made false statements with intent to aid the enemy, obstructed recruiting, or caused insubordination of the troops. Many persons were prosecuted under this law for utterances supposed to have that effect. Both judges and juries reacted to war hysteria. As a result there were many convictions followed by excessive sentences.

The Supreme Court took the position that, while expression of opinion must be entirely free from prior censorship, the government might punish the advocacy of ideas where there was a "clear and present danger" that such advocacy would ripen into illegal action. The decisions on this principle were

unanimous. Justice Holmes said in his opinion in the leading case of Schenck v. United States:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.

Presumably Justice Holmes believed individuals were afforded substantial protection from unjust prosecution by the formula which he created. Actually it proved to be of little practical value during periods of hysteria, a fact soon illustrated in cases in which the majority of the Supreme Court upheld convictions and Justices Holmes and Brandeis dissented because they believed the rule had been improperly applied. The most shocking of these was the case of Abrams and others, in which sentences of twenty years were imposed for the issuance of pamphlets condemning American intervention against the new Soviet Government of Russia. In his dissenting opinion in that case Mr. Justice Holmes said:

> Persecution for the expression of opinions seems to me perfectly logical. *If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.* To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is

> better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

During the Second World War there were also numerous prosecutions based on utterances. Some of these were based on statements made before we were at war, on the ground that they advocated the forcible overthrow of the government or caused disaffection within the armed forces. Such prosecutions rested on the Smith Alien Registration Act of 1940 which, for the first time since 1798, enacted a peacetime sedition law. Other prosecutions rested on publications which followed Pearl Harbor and were more directly related to the prosecution of the war. In general they differed from prosecutions of the earlier war chiefly in the character of the defendants. In 1917 and 1918 most of those prosecuted were Socialists opposed to war on doctrinaire grounds. No one supposed they were in sympathy with the aims of the German militarists. During the later war, however, most of those prosecuted had been sympathizers with, if not adherents of, the Nazi or Fascist systems of government. The views for which the Socialists were condemned in 1917 and 1918 were not views which would have been received with favor in Germany. The views for which people like Christians, Pelley, and others were convicted in 1942 and 1943 were, if not copied from the declarations of Hitler and Goebbels, still largely inspired by them.

It is perhaps for that reason that there was so little outcry against these more recent prosecutions.

But there have also been some prosecution of extremists, such as the witnesses of Jehovah and the Socialist Workers Party. The Supreme Court unanimously reversed the conviction of several "witnesses" under a Mississippi wartime sedition law which punished the distribution of literature "calculated to encourage disloyalty to the government." Several witnesses of Jehovah were prosecuted because they distributed literature which stressed the supremacy of the law of God over secular law. One of the witnesses was charged also with saying that the President should not have sent our soldiers overseas and that it was wrong to fight. Mr. Justice Roberts concluded that, as applied to these persons, the law was unconstitutional because it penalized the communication of opinion in the absence of a sinister purpose or a clear and present danger to the government.

The Supreme Court, however, refused to review the convictions of members of the Socialist Workers Party charged with having, in 1940, advocated overthrow of the government by force and with spreading views which might cause disaffection in the armed forces. The lower courts had held that the clear and present danger rule was not applicable to this prosecution because Congress had declared opinions such as those expressed by the defendants to be harmful.

It is evident that laws which permit the punishment of people because of the opinions they express are subject to great abuse. In times of excitement it is natural to condemn any person who opposes the view of the majority. During a war it is almost inevitable that this should be the reaction of most men. It is particularly important, therefore, that prosecutions should not be instituted except where it is clear that the words used are really dangerous to the successful prosecution of the war.

There are other forms of restriction of opinion besides criminal prosecutions. During both world wars the Post Office De-

partment exercised wide powers of censorship. Many periodicals were banned from the mails and in some instances the second-class mailing privilege was taken away. In 1917 and 1918 this happened to numerous Socialist papers. The case of the *Milwaukee Leader* was the most important since it went to the Supreme Court. Postmaster General Burleson revoked the paper's second-class mailing privilege on the ground that several issues contained matter hostile to the conduct of the war and therefore violated the Espionage Act. In 1942 Postmaster General Walker took similar action with regard to Father Coughlin's *Social Justice* and the Trotskyite *The Militant.*

The principle enunciated by the Supreme Court in the *Milwaukee Leader* case leaves wide discretion with the Postmaster General. The majority of the Court held that the publisher could not appeal to the courts to review the evidence if he had received a fair hearing and that the Postmaster General had the right to revoke the second-class privilege because of the paper's misconduct in the past. Justices Holmes and Brandeis dissented on the ground that the Postmaster General had the right only to declare particular issues of the paper nonmailable and that he could not stop the future use of the second-class privilege because past issues alone had been declared nonmailable. While Justice Holmes considered this as merely a question of the construction of the applicable law, Justice Brandeis expressed some doubt about Congress' constitutional right to grant the Postmaster General the powers he claimed for himself. Nevertheless, the doctrine of the majority has prevailed and the power of the Postmaster General to revoke second-class privileges has not been effectively questioned since that time. In any case, the Postmaster General should ban no periodical unless convinced that the statements made create a clear and present danger of the evil against which Congress has legislated. Mere opposition to the war is not a crime.

In considering the propriety of any restriction of opinion,

whether by criminal prosecution or by suppression of mailing rights, two important factors must be taken into account. In the first place, war brings a vast expansion of governmental power and a consequent tendency on the part of officials to object to criticism. As Wendell Willkie well said in his radio address upon his return from Russia and China in the fall of 1942, the more the government objects to criticism the more criticism it should get. In the second place, freedom of expression should be cherished even in wartime, not primarily for the sake of the individual who wishes to express an opinion, but for the sake of society which benefits greatly from the free exchange of ideas. Professor Chafee of Harvard, in his great book, *Freedom of Speech,* has pointed out the many evil consequences of suppression. Thousands of persons not directly affected by the prosecutions undertaken by the government are frightened by the suppressions already accomplished. Thus much expression of value is silenced through fear of punishment. Indeed, Professor Chafee goes so far as to attribute some of the bad features of the peace of 1919 to the suppression of discussion during the war. His words should be constantly before every administrator and prosecutor charged with initiating suppression of opinion and before every judge whose duty it is to review such suppression:

> The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Private Restraints on Freedom

SINCE the forces which oppose liberty are deep-rooted in human nature, it is not strange that restraints on freedom will operate in all the varied activities and relationships of man. The father restrains the liberty of the child, not always for the latter's good. The husband restricts the freedom of his wife, as does the wife that of her husband. The employer is astute to curtail the extent to which his employees can freely co-operate with one another, and the employees make every effort to hem in the power of the boss. Every exercise of power results in some interference with the freedom of others. Generally the community remains indifferent, but there are circumstances under which the government has intervened. Ordinarily such action is left to the various states. In rare instances, such as interference with voting for national officers or attempts to enslave, the federal government has constitutional power to punish the offender.

When private individuals interfere with the rights of others to express themselves freely or one group of citizens discriminates against another in regard to employment, housing, or places of entertainment, the federal government is powerless to interfere. This is because of the language of the post-Civil War amendments which (except for the Thirteenth outlawing slavery) forbid only the states, not private individuals, from discrimination or arbitrary action.

There are two chief problems: discrimination on racial grounds and curtailments of freedom of speech, press, and assembly. Sometimes they are related, as in parts of the South where the dominant whites fear the more numerous Negroes and therefore seek to keep them in a state of semi-feudal in-

feriority. But it would be a mistake to suppose that the problem is only a sectional one. There is widespread discrimination against the Negro in the North as well as in the South. And discrimination is practiced not only against the Negro. In many industries Jews are denied opportunities of employment. In some sections Catholics are subject to special limitations. Mexicans are discriminated against in the Southwest; on the West Coast persons of both Chinese and Japanese ancestry have been subjects of special antagonism.

No more serious domestic problem confronts our society than the elimination of discrimination along racial or religious grounds. It is evident that we are here dealing with a widespread emotion that cannot be eradicated by law alone. Publicity and education are the weapons that must be widely and wisely employed in this struggle.

In the realm of freedom of expression there is perhaps more that can be accomplished by law. Here we are not dealing with primitive reactions to quite the same extent as in the field of discrimination. Moreover, the state has such an interest in stimulating a variety of human expression that it must take some steps to make such expression possible. Obviously the state cannot tolerate any monopoly either in the mediums of expression or in the places where people can meet together. That is why the radio has been subjected to strict governmental control, for its limited air waves easily lend themselves to private monopoly. There are some who think that the state's function should end when it has assured freedom from monopoly. There are others who believe that the state has a more affirmative duty.

This problem was sharply focused by the suit that the federal government brought against the Associated Press in 1942. The suit proceeded on the theory that the Associated Press violated the Sherman Anti-trust Law because it refused to allow new papers to acquire its news service except on the sufferance of competitors and on terms so burdensome as, in effect, to be prohibitory. Whether or not the practices com-

plained of are monopolistic is not our concern. But both parties to the suit invoked freedom of the press in support of their contentions.

The Associated Press asserted that any governmental interference with its methods of doing business constituted an impairment of freedom of the press. The argument was rejected by the Court since the government was not seeking to restrict any newspaper's desire to print what it pleased, but only to give more newspapers an opportunity to print Associated Press news. Moreover, the newspapers have so often "cried wolf" in the process of complaining that the application to them of reforms such as the Wagner Act and the Wages and Hours Act interfered with their freedom, that their claim in this case was open to suspicion.

On the other hand, the government argued that its action fostered freedom of the press because it increased the opportunities for newspapers to give service to the public. The contention has some force, but only in a loose sense. For, while it is true that the public might get Associated Press news in more varied forms if that organization had more liberal membership rules, it does get that news at present. Precisely how the news should be disseminated and on what terms would seem to be more a commercial problem than a question of freedom of the press. Judge Learned Hand, however, supported the thesis of the government, saying that the public interest

> . . . is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection.

Somewhat different is a problem which arose in the radio industry when certain practices actually prevented people in some areas from hearing certain broadcasts at all. The large networks compelled local stations to agree that they would not take any feature issued by a competing network. In con-

sequence, if a particular feature was not broadcast by the local station affiliated with the network which originated that feature, no station affiliated with any other network could carry it, no matter how much the people of the locality might want to hear it. Accordingly, the Federal Communications Commission prohibited this practice. The networks took the matter to the courts but failed in their endeavor to have the regulation set aside. It is evident in this case that there was a public interest in freedom of speech which justified governmental interference with private restrictions.

Another radio situation is less clearly a free speech issue. Newspapers have become the owners of many radio stations. In some communities there are only one newspaper and one radio station. Should the local paper, in such a situation, be allowed to operate the only broadcasting service? Some persons argue that this double ownership results in limiting the service to the public—one point of view is expressed where otherwise there might be two. Others point out that, under modern conditions, the local newspaper might not be able to survive unless it also owned the radio station. There has not been enough experience with these special cases from which to draw any valid generalization.

The peculiar status of the radio has led to a self-imposed regulation which has borne curious results. It relates to so-called "controversial" subjects. In other fields there is no similar problem. For example, anyone can print and circulate a pamphlet to expound his views. Also, the newspapers generally will take advertisements to express ideas of various sorts, and while the cost may be considerable, there are few practical difficulties about their insertion in the paper or their availability to the reading public. This is not so on the air. There the question of timing has created special problems. If Mr. A. has spoken on an important subject over WXYZ, no answer given by Mr. B. on a smaller station or at a less desirable hour can be really effective. And should an answer be given on a subsequent day, it is not likely to reach the same people. In

consequence, the supporters of any cause who have the money to buy radio time first are at a great advantage. It has been suggested that a station which allows one side of a controversy to have time on the air should give the other side an immediate opportunity to reply. In many cases, however, there are not two but several sides to an argument. And who is to choose the spokesman for the side that wants to answer? Who will pay for the time? These practical difficulties have led the broadcasters to adopt a regulation prohibiting the sale of any time for controversial discussion. The net result, however, has been either the total elimination of controversial subjects from the air or the subtle injection of controversy into broadcasts supposedly only commercial. The interest of the public in full discussion of important subjects on the air calls for a more satisfactory solution of the difficulty.

Private restraints also operate in other mediums of expression such as the newspaper and the motion picture, and affect the availability of meeting halls. Pamphlets and leaflets have been the classical answer to a press which refuses to permit minority opinion to be heard. That is why it is so vital that municipalities should not be allowed to restrict these forms of expression by taxation or license requirements. Public meeting places are the only answer to the refusal of private owners to make their halls available to all shades of opinion. In some cities, notably New York, the public schools meet this need. But for the self-imposed censorship of the motion picture producers there is as yet no satisfactory substitute. We cannot look to the government to help here, except perhaps by producing some pictures itself on topics of public interest.

In the main, the function of government in the field of opinion should be to keep the channels of communication open and to prevent monopolistic practices. Occasionally it can provide substitutes of its own for private propaganda. In other fields the government should also put an end to all discrimination because of race. To the extent that the power of the federal government to accomplish this is now restricted

by Supreme Court decisions of past generations—that federal power does not extend to discrimination by private persons—attempts should be made to get a reconsideration. And if that fails, the desirability of amending the Constitution should be seriously considered. For it must be recognized that discrimination in employment, housing, transportation, or any of the other general functions of modern life easily becomes the stepping stone to the destruction of all liberty. Fascist-minded leaders create a certain cohesion in the ranks of their followers by encouraging disdain of some other group, by preaching inequality and otherwise creating discrimination. No state, therefore, can remain sound which permits discrimination to exist.

How Far Is the Bill of Rights Binding on the States?

WHILE the post-Civil War amendments are all expressly binding on the states, it is significant that there is no reference to state action in the eight amendments which form the Bill of Rights. Indeed, in 1789 the Congress refused to submit for ratification a proposed amendment which would, in part, have made the Bill of Rights binding on the states. This proposal, accepted by the House of Representatives but rejected by the Senate, provided:

> No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor the rights of trial by jury in criminal cases.

Madison, who assumed charge of the various proposed amendments, regretted the failure of this one, "the most valuable of the whole list."

As finally adopted, no one of the provisions of the Bill of Rights refers to the states. Indeed, the First Amendment by express terms applies only to Congressional action. Attempts to induce the Supreme Court to rule that various provisions of the Bill of Rights restrict state action have uniformly failed. At first such attempts were made on behalf of property rights. The claim was asserted that the provision in the Fifth Amendment forbidding the taking of property without compensation permitted an appeal to the Supreme Court from a state court decision. This contention was rejected by Chief Justice Marshall in no uncertain terms. The same rule was laid down with regard to the Seventh Amendment which provides for jury trials in civil cases. Accordingly, the Supreme Court rejected various claims that personal liberties guaranteed by the

Bill of Rights were protected against state action. It so ruled with regard to religious liberty, freedom from being twice prosecuted for the same offense, and protection against unlawful seizures. So the matter rested until after the Civil War.

But the adoption of the Fourteenth Amendment changed this in part, although many years passed before the change was recognized. At first the Supreme Court merely reiterated the old rule that the provisions of the Bill of Rights were not directed against state action. It held that trial by jury, the right to be prosecuted for serious crime only upon indictment, freedom from self-incrimination, and protection against unreasonable searches and seizures were not rights guaranteed by the federal Constitution against denial by a state. Later, however, the Supreme Court reached the conclusion that certain personal rights such as freedom of religion, of speech, and of the press are essential parts of due process of law which the Fourteenth Amendment protects against state interference.

It should be observed that this broadened interpretation of the due process clause became possible by reason of an extended meaning which had been given to it toward the close of the nineteenth century in cases involving state regulation of business. But that extended meaning had been in vogue for a full generation before it was extended to personal rights. And as late as 1920 Justice Brandeis was moved to say in a dissenting opinion: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."

A few years later the Supreme Court heeded his admonition. The rule now current with regard to free speech and press was first announced in 1925. Since then it has been extended to cover the other rights referred to in the First Amendment, those of religious freedom and freedom of assembly. But the same rule has not been extended to all the other amendments. In 1938 Mr. Justice Cardozo attempted a formulation of the distinction as follows:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.

In a later case Justice Roberts summed up the matter in this way:

> Due process of law is secured against invasion by the federal government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

There is one peculiar feature of the reading of these guaranties of the Bill of Rights into the due process clause of the Fourteenth Amendment. This relates to the rights of corporations. Long ago the Supreme Court held that, because of

the "inanimate" nature of corporations, the words "life" and "liberty" of the due process clause do not apply to them; only the word "property" does apply. Consequently a corporation can invoke the Fourteenth Amendment against state interference with rights such as freedom of religion, of the press, or of assembly only if its property rights are infringed. The American Press Company successfully contested a Louisiana tax on advertising. The American Civil Liberties Union's attempt to overthrow a Jersey City ordinance which banned street meetings failed. In the one case a property right was affected; in the other it was not. This attitude toward corporations is paradoxical: freedom of the press has been brought within the due process clause of the Fourteenth Amendment because it is a "liberty" fundamental to a free society, yet a corporation can protect this fundamental liberty against state infringement only if it makes money out of it!

The Supreme Court has also extended to defendants accused of crime in state courts some of the specific protections of the federal Bill of Rights, its guiding principle being to assure a fair trial. Thus the Court has ruled that no state trial is fair if dominated by mob hysteria, that no state conviction can stand if it rests on confessions obtained by physical or mental torture. Denial of counsel in a state court may be unfair, but that depends on the circumstances. Jury trial may be dispensed with altogether by the states and the defendant may be required to testify. Whether a state conviction will be upheld which is based entirely on illegally seized evidence remains as yet undecided.

The propriety of state action may be tested in more ways than one: by direct appeal to the Supreme Court from a decision by the highest court of the state to which the case there pending could be taken, and by original proceedings in the federal courts, either through injunction or through habeas corpus. As a rule, however, the federal courts will not interfere until all attempts to obtain relief in the state courts have been exhausted.

These various decisions have, in effect, written into the Constitution, through the due process clause of the Fourteenth Amendment, all the provisions that the Senate rejected in 1789 except the one applying to jury trial in criminal cases!

CHAPTER VI

Religious Liberty

WHILE many of the early settlers had come here in order to escape religious persecution in England, religious tolerance was not common in the American colonies. Even at the time of the Revolution Catholics and Jews were discriminated against—New York excluded both from the suffrage. In many colonies there were established churches. But since Virginia adhered to the Church of England and Massachusetts, New Hampshire, and Connecticut were Congregationalist, it is not surprising that it should have been thought desirable that the new federal government should set up no established church of its own.

Religious tests for office-holding had been common both in England and in many of the colonies. They were first rejected by Massachusetts in 1780 and then by Virginia in 1785 in the celebrated *Statute of Religious Liberty* written by Thomas Jefferson. The Preamble of that declaration is worth quoting because its principles are applicable to freedom of speech and of the press as well as to religious freedom:

> Preamble: Whereas God hath created the mind free . . . our civil rights have no dependence on our religious opinions; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to office of public trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on

the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiment of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally that truth is great and will prevail if left to herself, that she is the proper and self-sufficient antagonist of error and has nothing to fear from the conflict.

This was followed by the Northwest Ordinance of 1787 which provided that no one should be "molested" on account of his religious sentiments.

The Constitution contains two provisions on the subject of religion:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . —First Amendment.

> . . . all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.—Article VI, clause 3.

It is clear that the constitutional guaranties were intended to prevent Congress from discriminating among religions. Nevertheless, despite legal guaranties of religious equality, there have been numerous judicial statements that this is a "Christian" country, one of the results being that Bible reading in the schools has been universally approved. Moreover, while no one can be compelled by Congress to pay taxes to support a religious institution, the tax exemption universally given to all such institutions does result in increased tax payments by those portions of the community not associated with any religion.

In general, the guaranty of religious freedom extends to belief and to expression of belief, but not necessarily to acts founded on belief. In discussing laws which have been challenged as violations of the guaranty, we shall see that the legislature remains free to prohibit actions deemed harmful to the state. This power of the legislature may often result in a sharp curtailment of what some consider the right to religious freedom.

The provision of the Constitution concerning religious tests as qualification for office is expressly applicable only to federal offices and it has never become binding on the states. While there are today no sectarian religious qualifications on the right to hold office, provisions in the constitutions of Arkansas, Delaware, Maryland, and Pennsylvania restrict office-holding to believers in God.

Nor is the First Amendment binding on the states. This was decided before the Civil War on a vain challenge of an ordinance of New Orleans, aimed at Roman Catholics, which forbade the bringing of corpses into Catholic churches. So the matter stood until well into the twentieth century; as we have seen, it took a long time for the United States Supreme Court to recognize that religious freedom was part of the due process guaranteed by the Fourteenth Amendment against state action.

What Laws Violate Religious Freedom?

The Mormons afforded the first test of the meaning of the First Amendment in so far as it deals with religion. When Congress outlawed polygamy in the territory of Utah, the Supreme Court was confronted with the necessity of determining whether that practice, because commanded by the Mormon Church, was an exercise of religion which Congress must respect. In a unanimous decision the Court rejected the contention of the Mormons and made a distinction between opinions and acts. Chief Justice Waite declared that the First Amendment did not deprive Congress of the right to punish

actions it deemed harmful to the community and noted that polygamy had been "odious" among all western peoples. That view was adhered to in a later case which involved a law of the territory of Idaho excluding from the right to vote any person who was a polygamist or who advised others to become polygamists. In another unanimous decision Justice Field upheld this law on the ground that advocacy of the proscribed practice was itself a crime and therefore a proper basis for disqualification from voting:

> To call their advocacy a tenet of religion is to offend the common sense of mankind.

An interesting question, though not raising a constitutional issue, arose in New York in the prosecution of a Christian Science healer on the charge that he was practicing medicine without a license. The statute expressly excepted from the license requirement "the practice of the religious tenets of any church." The New York Court of Appeals, recognizing that Christian Science was a religion and that its healers were practicing its tenets, declared that the legislature had not intended to make it a crime to treat disease by prayer. But the Court warned that good faith was essential, that "religious" treatment would not be allowed to cover a business undertaking.

As was later said by Judge Cardozo when considering the case of a self-avowed spiritualist healer:

> The tenets to which it accords freedom, alike of practice and of profession, are not merely the tenets, but the *religious* tenets, of a church. The profession and practice of the religion must be itself the cure. The sufferer's mind must be brought into submission to the infinite mind, and in this must be the healing. The operation of the power of spirit must be, not indirect and remote, but direct and immediate. If that were not so, a body of men who claimed divine inspiration might prescribe drugs and perform surgical operations under cover of the law. While the healer inculcates the faith of the church as a method of healing, he is immune.

> When he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh, his immunity ceases. He is then competing with physicians on their own ground, using the same instrumentalities, and arrogating to himself the right to pursue the same methods without the same training.

As religious beliefs cannot avail to protect acts deemed harmful by the legislature, so religious beliefs may not be used in order to obtain exemptions from legal provisions of general application. Thus pacifists failed in their attempt to secure reinstatement in a state university which had suspended them because they refused, on conscientious grounds, to take a compulsory course in military training. And the courts have uniformly held that there is no constitutional right which would relieve conscientious objectors from military service; any exemption granted by Congress is an act of grace. In consequence, the determination of an individual's right to such exemption lies with the draft boards and the appeal machinery established by Congress. The courts will not, in the absence of arbitrary action, review the action of these administrative agencies. Even when the action of the draft board is illegal, the order of the board may not be ignored. The registrant must submit to induction and then challenge the validity of the draft board's action in habeas corpus proceedings. He may not challenge the validity of the draft board's action in defense to an indictment charging him with refusal to appear for induction.

Pacifists have also failed in attempts to obtain citizenship, although no direct question of religious freedom was really involved. These cases, in which Justices Holmes, Brandeis, Stone, and Hughes dissented, turned on the question whether an applicant's refusal to pledge military support in time of war disqualified him as an applicant for citizenship. The majority of the Court concluded that Congress had required such a pledge, even in the case of women, or of men above military age.

The Witnesses of Jehovah

The issue of religious freedom has most often been raised by the witnesses of Jehovah. These preachers of their own interpretation of the Bible are accustomed to go on the streets or from house to house playing phonograph records and distributing leaflets. Taking literally the Old Testament injunction against worship of images, they refuse to salute the flag. Since they attack organized religion, and especially the Catholic Church, they suffer widespread unpopularity. In many communities in widely separated parts of the country they have been subjected to physical attack and legal discrimination. Cases involving their activities have flooded the courts. The questions raised include the right of schools to expel pupils who refuse to salute the flag, the right of communities to forbid, censor or license the distribution of literature on the streets or from house to house, the right to punish the witnesses for playing their phonograph records, the right to restrict solicitation of funds for religious purposes. In part these cases have turned on issues of religious freedom, in part on issues of freedom of speech and of the press. We shall here consider only those in which the religious issue was considered by the Supreme Court.

The first of these is the Cantwell case. Two questions were involved: the validity of a statute which required a permit for the solicitation of funds for religious purposes and which gave a state official the right to determine whether a particular cause was a religious one; the propriety of a conviction for disorderly conduct based only on the peaceful playing of phonograph records by a Jehovah's witness. On both heads the Court decided unanimously that freedom of religion had been impaired. Mr. Justice Roberts said of the permit statute:

> Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to es-

> tablish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Of the conviction for the phonograph playing he said:

> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

On the other hand, the Supreme Court ruled adversely upon the claims of the witnesses in the Cox case. It was the Court's unanimous decision that a law requiring a license for the holding of a parade on the streets did not constitute an interference with religious liberty since the state court, in construing the law, had ruled that it did not either censor or discriminate.

The right of school boards to expel children because they refused on religious grounds to salute the flag resulted in two conflicting decisions. In 1940 the Court, in the Gobitis case, upheld such an expulsion. Mr. Justice Frankfurter rested his decision largely on the need for "national cohesion," an interest "inferior to none," for "national unity is the basis of

national security" and "the ultimate foundation of a free society is the binding tie of cohesive sentiment." He held that state legislatures and school boards are the appropriate agencies to determine what measures are appropriate "to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious." He could see no ground for judicial interference in a field so "unauthenticated by science." And he concluded:

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Mr. Justice Stone, in solitary dissent, conceded that the guaranty of religious freedom was not absolute, but believed, since methods other than compulsion could be found to teach patriotism and loyalty, that the state could not justify compulsion in a case such as this. He rejected the view of the majority that the legislative will is supreme "as long as the remedial channels of the democratic process remain open." This, he said, was but surrender of the rights of small minorities.

Fortunately, the courts of the various states which were confronted with problems arising out of the refusal of the children of Jehovah's witnesses to salute the flag never carried the Gobitis case to its logical conclusion. When attempts were made by the authorities to take such children away from their parents or to punish the parents for encouraging the children, the state courts, without exception, have declared that to take such steps would be to infringe freedom of conscience.

In June 1942 the validity of the Gobitis case itself was weakened by the unprecedented recantation by Justices Black, Murphy, and Douglas of their concurrence with the conclusion of Justice Frankfurter, a recantation expressed in a brief opinion in another but unrelated Jehovah's witness case. Thus only three judges remained on the bench who had originally agreed with the decision—Justices Roberts, Reed, and Frankfurter—with four of the sitting judges having expressed themselves the other way. This unusual situation led three lower federal judges sitting in the Fourth Circuit to declare in Barnette v. West Virginia Board of Education that the Gobitis case was no longer the law and to conclude that it had been wrongly decided. When the Barnette case reached the Supreme Court in 1943, it overruled its own original decision by a 6–3 vote. Justice Jackson wrote an eloquent opinion for the new majority. Pointing out that the witnesses interfered in no way with the rights of others in claiming exemption from the obligation to salute the flag, he added:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . .
>
> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

opinion or force citizens to confess by word or act their faith therein.

Justices Black and Douglas concurred in a separate opinion and pointed out that the action here required by the school authorities was a form of "test oath" which has always been "abhorrent" in this country, that "words uttered under coercion are proof of loyalty to nothing but self-interest," that the ceremonial "is a handy implement for disguised religious persecution."

Justice Murphy also wrote a separate opinion in which he referred to the Virginia *Statute of Religious Liberty* which had been drafted by Jefferson: "all attempts to influence [the mind] by temporal punishments . . . tend only to beget habits of hypocrisy and meanness."

Justices Roberts and Reed merely noted their continued adherence to the views expressed by Justice Frankfurter in the earlier case. Justice Frankfurter expanded those views, however, in a dissent which made plain that he disliked the regulation in question but that he could not reach the conclusion that there was no rational basis for a view opposed to the majority opinion. He called attention to the fact that in earlier cases thirteen judges of the Court had been of this opinion.

He thus summed up his views on religious freedom:

> The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to

cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

In 1943 the Court decided two cases pertaining to religious freedom which involved a Mississippi law making it a criminal offense "stubbornly" to refuse to salute the flag. The law was invoked against witnesses of Jehovah and challenged on the usual grounds. Three judges of the Mississippi supreme court were of the opinion that the law was valid solely because enacted during wartime to promote loyalty and unity. Three other judges vigorously dissented, and the United States Supreme Court subsequently agreed with these dissenters. Mr. Justice Roberts wrote for a unanimous Court; after pointing to the Barnette flag salute case decided on the same day, he said:

> If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views.

These cases finally set at rest the long controversy over saluting the flag and assure to all the right to act freely on their religious beliefs so long as no serious harm to others results.

Conflicting decisions were handed down by the Supreme Court on the subject of the right of municipalities to tax the

distribution of leaflets on the public streets or from house to house, where the leaflets were sold or contributions were requested in connection with their distribution. At first the Court sustained the tax by a 5–4 decision. Then it granted a rehearing and reversed itself. These cases belong, however, rather under the heading of freedom of speech and of the press than under the heading of religious freedom.

But although municipalities now may not prevent the witnesses of Jehovah from selling their literature on the streets, or tax them for the privilege of doing so, they can prevent sales of such literature by the children of the witnesses. That was decided on January 31, 1944, in the case of Prince v. Massachusetts. The Court divided 5 to 4, but not along the same lines as it had divided in the earlier cases. Justice Rutledge wrote for the majority, which included Justices Black, Reed, and Douglas, as well as the Chief Justice. There were two minority opinions: one by Justice Jackson, with which Justices Roberts and Frankfurter concurred; a separate one by Justice Murphy alone.

The majority took the view that since the state has a right to protect the welfare of its children, it can prohibit the use of the streets to children even for the purpose of religious exercises, and this despite the fact that in the particular case the children were accompanied by their parents. Justice Rutledge pointed to the possibility of "emotional excitement and psychological or physical injury." Justice Murphy dissented because he could find no reasonable basis for a belief that harm would result to the child from the activities in question. The other three Justices, who had previously twice voted to sustain the leaflet taxes, took the position that the state should have the right to regulate even religious activities whenever they "begin to affect or collide with liberties of others or of the public." While they felt that that line had been rejected in the leaflet tax cases, they could see no basis for drawing any line on the basis of age. They thought that child labor laws should be applied both to street proselytizing and to the activ-

ities of children in churches if they were to be applied to either.

There is a statement in the decision of the majority questioning the right of parents to "make martyrs of their children before they have reached the age of full and legal discretion." It is to be hoped that this sentence will not provide the springboard for other attempts to restrict the right of parents to control the religious activities of their children.

CHAPTER VII

Freedom of Speech and of the Press

CENTRAL to all liberty is the right to speak one's mind and to communicate one's ideas through all available mediums of expression. The potency of such freedom as a threat to those in power has long been recognized. Devices for the restriction of expression of opinion, particularly in criticism of government, have been numerous. They include outright prohibition of all but the official opinion, censorship of proposed publications, license requirements which give officials wide powers of suppression, burdensome taxation which lessens the opportunities for publication and distribution, and punishment for opinions expressed. England and the American colonies were both familiar with all these devices. Especially hateful were stamp taxes on newspapers and pamphlets, and prosecutions for seditious libel.

Two famous cases dramatized the latter form of restriction in the years just before the American Revolution, the cases of Peter Zenger in New York and of John Wilkes in England. Both men were accused of seditious libel for criticisms of government. Zenger stood trial and was acquitted after his lawyer, Andrew Hamilton of Philadelphia, insisted that the jury, not the judge, should decide whether the article complained of was libelous. Wilkes, fearing life imprisonment, fled but later returned, was elected to Parliament but expelled, was convicted and imprisoned, becoming a martyr for liberty and occasioning riots, was chosen Lord Mayor of London and re-elected to Parliament, and finally was allowed to take his seat, championed the cause of the American colonists during the Revolution, and sponsored reforms in the law relating to the press.

As an outgrowth of these experiences the First Amendment provided:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, . . .

Controversy raged for over a century concerning the interpretation of this restriction on governmental power. All were agreed that it prohibited any laws which might censor publications in advance, either directly or through licensing requirements or burdensome taxation. It should be noted, of course, that the prohibition against censorship prior to publication is not absolute. In time of war publication of information which might be of value to the enemy can be prevented. Also, censorship of obscene publications is probably not prohibited by the Constitution. Blackstone, the great compiler of legal learning, thought that protection against prior restraints was the only meaning which should be given to freedom of the press, and many American judges accepted his view in the first decades of our history. Indeed, as late as 1907 Oliver Wendell Holmes gave this doctrine his blessing while sitting on the United States Supreme Court.

However, reflection on the events of the eighteenth century which had inspired the amendment, especially on such cases as those of Zenger and Wilkes, and analysis of the real purpose of the constitutional guaranty showed that this Blackstonian concept was insufficient. For the purpose of the guaranty is to permit full expression, not chiefly for the sake of the individual who desires to talk or write, but primarily because it is essential to a free community that all views be heard so that they can be weighed and the better view accepted. Clearly, full expression is curtailed not alone by prior censorship but also by subsequent punishment. Fear of imprisonment can and does result in silence. Therefore the constitutional guaranty must also prevent the punishment of persons for the words they have already uttered.

What Words May Be Punished—the "Clear and Present Danger" Test

Words, to be sure, are sometimes the equivalent of acts, not merely the expressions of opinion. As acts they are not within the constitutional protection; as opinions they may be. If one man induces another to commit a crime, he may be punished though he used only words. And he may be punished even if his words failed of their purpose. A man's words may be punished, too, if he used them to exert unlawful pressure: to obtain blackmail, for example, or to produce socially harmful results such as a run on a bank.

Even pure expression of opinion may be the source of great harm, harm both to individuals and to the state. Defamatory remarks damage individuals, advocacy of crime affects the community. The state must, therefore, have some power to punish words. There comes a point at which the state's concern with words as potential cause of harm conflicts with its interest in the widespread expression of opinion. When that point is reached, the constitutional guaranty is called in question. As we shall see, the courts have had great difficulty in deciding where the line is to be drawn which divides the area of punishable words from the realm of free speech which is constitutionally protected.

In considering the kinds of words that can constitutionally be punished distinctions have been made between expression of opinion, incitement, and advocacy. Words that are merely expressions of opinion can never be punished, it has been urged; words that are incitements to unlawful action can be punished; whether advocacy of such action can be punished depends on the circumstances. These summary conclusions are not altogether accurate. For instance, an opinion that is defamatory of an individual may be criminally punishable. Here the social interest in free speech is subordinated to the private interest of the person affected. Leaving this exceptional case to one side, however, the distinctions above indicated pro-

vide a satisfactory working rule: Some illustrations may demonstrate this.

Suppose a judge has issued an injunction in a labor dispute. A labor leader states that the decision was wrong on the facts and the law. That is merely an opinion, on the basis of which the leader cannot be punished for contempt of court. But if he adds that the injunction should be disobeyed by all members of the union, that is an incitement to an unlawful act and can be punished. On the other hand, a general statement that the world would be a better place if union members ignored injunctions may be punished only if made under circumstances indicating a "clear and present danger" that it would be acted upon.

This formulation of the "clear and present danger" test as a measure of what expressions of opinion are punishable first occurred in 1919 in an opinion by Mr. Justice Holmes. In upholding a conviction under the 1917 Espionage Act on a charge of discouraging recruiting, he said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.

While this test has not been universally applied, it constitutes the "minimum" protection afforded by the Constitution.

It is essential to bear in mind that the "danger" referred to in the rule is the actual occurrence of some event which the legislature has declared illegal and which it has the constitutional power to punish. An extreme illustration will make clear what is involved: A statement advocating the election of

a Republican candidate in a sharply contested election may well present a "clear and present danger" that the election of the Republican will result. Yet that does not permit punishment of the person making the statement, since it would be unconstitutional to prohibit the election of a Republican candidate and no legislature has attempted to make such an act a crime. For all its obviousness, this rule is often lost sight of. With this preliminary caution in mind, we can reach an understanding of the application of the "clear and present danger" test by analyzing its three component parts: that there is a danger, that it be clear, and that it be present.

A due consideration for the first of these elements ought to make it plain that trivial statements should never be prosecuted. This remains true even in time of war, since expressions of opinion in private conversation or personal letters can create no danger of harmful consequences to the war, at least in the absence of proof that the remarks were systematically repeated. In the same category are general criticisms either of the conduct of the war or of our allies, however widely broadcast. Even proposals for concluding the war should be immune from prosecution. Calmly considered, none of these views can produce any of the dangers against which the law seeks to guard. Clearly they cannot result in the overthrow of the government or in military disaffection or even in obstruction to recruiting. All the more is this true of opinions with regard to capitalism or imperialism, or of grievances expressed by groups which believe themselves the victims of discrimination. It is evident, then, that whether a danger exists depends in part on the nature of the statement, in part on the accompanying circumstances. While remarks made in a single private conversation would create no danger, the same words spoken to a camp full of soldiers might very well do so.

The test further requires that the supposed danger be "clear"—that is, there must be a reasonable expectation that the harmful consequence prohibited by law will ensue. It is not enough to say that the words used had the "tendency" to

produce such result. The difference here is one of emphasis, difficult either to define or to illustrate.

Finally, the danger must be "present." That is to say, it must be imminent in point of time. This aspect of the rule has particular importance when applied to prosecutions based on the advocacy of the overthrow of the government by force. In such cases the number and power of the accused persons or the group to which they belong are factors of great importance in determining whether there was any reasonable prospect that the violent revolution advocated by the accused could be accomplished so soon that the force of the criminal law would have to intervene to protect the state. The stress is less on the words themselves than on the circumstances of their utterance and the situation of those uttering them.

Perhaps the best judicial statement on the meaning of the test was made by Mr. Justice Brandeis in his concurring opinion in Whitney v. California:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to

> avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

To just what type of cases this test is applicable remains unsettled. Late in 1943 the Supreme Court avoided an opportunity of clarifying the subject when it refused to review convictions of members of the Socialist Workers Party for sedition. The lower courts had held that the clear and present danger test did not apply because Congress had decided that the opinions expressed were harmful to the country.

Application to the States

The section of the First Amendment dealing with free speech, like that dealing with religion, had no application to state laws or other governmental action by the states or their subdivisions until after the adoption of the Fourteenth Amendment. Even half a century after that amendment had been adopted, the Supreme Court stated that nothing in the federal Constitution imposed any restriction on the states with regard to freedom of speech.

However, new judges brought new wisdom. At length, in 1925 the Court announced the revolutionary principle that the Fourteenth Amendment, which protected "liberty" against state infringement "without due process of law," prevented a denial of freedom of speech and of the press. These great privileges were deemed by the Court to be so essential to a free society that any attempt to destroy them must be considered a deprivation of "due process." That position, first taken in the Gitlow case in which the Supreme Court upheld the constitutionality of the challenged state law, has never since been questioned. It has resulted in many decisions holding state laws and municipal ordinances void because impairing freedom of speech or of the press.

Types of Cases

It is impossible in a book not solely devoted to the subject of freedom of expression to deal with all its phases. Fortunately it is not necessary to do so, since Professor Chafee in 1941 published *Free Speech in the United States,* a revision of his earlier *Freedom of Speech* issued just after the First World War. Here a summary of the most essential points must suffice.

It is best to consider, first, various kinds of words which have been occasions for prosecutions: words which attack individuals and are punished as libels; words which offend the community's sensibilities and are thought obscene or blasphemous; words which attack judges and are punished as contempt of court; words which attack government and are punished as seditious; words which provoke violence. Words of the kind just described are not cause for criminal prosecutions alone; sometimes they result in exclusion from the mails or detention in the customs of the book or pamphlet in question, sometimes in the deportation of the person who has written them or subscribed to the views expressed.

Next it will be necessary to consider forms of restriction on expression not related to the matter expressed, such as license requirements, burdensome or discriminatory taxation, and other restrictions on distribution.

Finally, there are special mediums of expression such as the radio, the motion picture, and the theater which are subject to rules other than those applied to the press. It will be found that there is no all-embracing rule applicable to each and every situation in which ideas are used to influence conduct.

Libel

Words which defame another person and thus are libelous are generally considered to be outside the constitutional protection of free expression. In the ordinary case of a statement

which injures the reputation of a private person, it is clear that the reason for the constitutional guaranty has no application. No issues are here involved on which the public should be informed. The harm to the individual defamed outweighs any benefit which might result to the public from a publication of the challenged statement.

But the moment the person libeled is a public official or the subject matter of the libel concerns a matter of public interest, other considerations exist. It is important that the conduct of public officials be given the widest possible publicity. Hence, if a defamatory statement is made concerning a public official, it should not be necessary to prove its truth. It should be possible for the maker of the statement to justify his having made it by showing good faith. In many states the law recognizes this by permitting the defense of "fair comment." In some states the interest of the public in information concerning its officials is so far recognized that defamatory statements about them are put in a class by themselves: unless the official can show that the statement has actually hurt him, he cannot sue.

There is as yet no satisfactory formulation of these various principles on a constitutional basis. An attempt to get the United States Supreme Court to consider this subject failed in 1942. Martin Sweeney, ex-Congressman from Indiana, considered himself libeled by a statement broadcast by Pearson and Allen to the effect that he had opposed the appointment of a certain man to federal office on the ground that he was a Jew. Sweeney thereupon sued Pearson and Allen and, in addition, several dozen of the newspapers which had printed the statement. Sweeney lost almost all of these cases on one ground or another. But in a suit he brought against the Schenectady Union Publishing Company, the federal appeals court decided that he might recover in New York without any showing of actual damage. The publishing company tried to have that decision reviewed by the Supreme Court and urged that its constitutional rights had been infringed. The Supreme Court,

however, by a vote of 4–4 refused to interfere and no opinion was written.

Whatever may be the situation in suits for damages, a different result obtains when the state tries actually to prevent the publication of a libel. In 1931 the Supreme Court, in the Near case, held void a Minnesota law authorizing the suppression by injunction of newspapers which habitually published scandalous matter. That state law was invoked against a paper which had persistently accused the county attorney and other public officials of misconduct. It is not clear, however, from the opinion of Chief Justice Hughes in that case, whether the decision would have been different had the case involved only private defamation.

One other aspect of libel law requires consideration here, although it is dealt with more fully elsewhere in this book. That is the question of group libel. Imitation of Nazi propaganda against the Jews and the revival of the myth of white supremacy have led many persons to urge that comment about racial or religious groups should be be prohibited. In so far as the aim is to stop false comment there would appear to be no constitutional barrier, although it is not probable that such legislation would achieve its objectives. If it were proposed, however, that all comment based on race or religion should be banned, a serious constitutional problem would present itself.

Obscene and Blasphemous Material

It is settled beyond question that both the federal government and the states may punish a person who publishes material which corrupts the morals of the young or offends the sensibilities of the religious.

Still, it is not always easy to tell whether a particular statement is "obscene" or merely a discussion of the relations between the sexes which is too frank or advanced for the "defenders" of the morals of a particular community. Birth-control discussion, even when it does not violate the laws

which prohibit imparting information on the subject, is sometimes judicially declared to be "obscene." For many years Marie Stopes' *Married Love* was barred by the customs and banned from the mails on this score. Many of the classics of our literature have been challenged by narrow-minded law enforcement officers. In the courts these challenges have met with varying fates. There is, perhaps, no more fascinating chapter in the law than the recital of the gradual enlightenment of judicial opinion in this field.

It can hardly be said that the field of blasphemy affords the same interest and variety. Yet here, too, we find some attempts to punish words whose only offense is that they shock the conventional.

Despite a considerable number of prosecutions for obscenity and blasphemy which a sophisticated community must deplore, it is interesting to observe that no such prosecution has yet resulted in a decision by the United States Supreme Court to the effect that the constitutional guaranties had been transgressed. This may be due to the general opinion that obscene and blasphemous words are entitled to no constitutional protection. Indeed, it has been said that obscene matter might be censored in advance of publication. It must not be assumed, however, that the mere label "obscene" or "blasphemous" will serve to prevent judicial scrutiny and condemnation of governmental restriction or prosecution if, in fact, freedom of expression is thus imperiled.

Contempt of Court

Until 1941 the courts also placed punishments for contempt of court outside the constitutional protection. In several early cases the Supreme Court justified this conclusion by the question-begging statement that freedom of the press does not mean the freedom to do wrong. Obviously, whether a particular criticism of judicial conduct seems wrong depends on the point of view from which it is approached. If the courts are considered sacrosanct, then the old rule is sound. But such a

view is hardly consistent with our form of government. The social importance of a full discussion of public affairs is too great to permit immunity to the judiciary, particularly since judges are the final arbiters of the propriety of the comment about their own colleagues.

The United States Supreme Court has at last recognized the necessity of bringing prosecutions for contempt of court within the free speech and press provisions of the Constitution. It reached this conclusion in the cases of Harry Bridges and of the *Los Angeles Times,* both of which arose in the state courts of California.

Harry Bridges, the West Coast leader of maritime labor, had sent a telegram to Secretary of Labor Frances Perkins immediately after a judge of a California state court decided that a local of Bridges' union had no right to represent a group of men who had gone to it from a rival union. He characterized the decision as "outrageous" and intimated that a strike might result if the decision were carried out. Los Angeles newspapers carried the text of the telegram, which they had received from the publicity director of Bridges' union. The Los Angeles Bar Association instituted proceedings for contempt of court because, at the time the telegram was sent and published, the judge was considering an application for rehearing of the case. Under these circumstances, they charged, the telegram was likely to affect the judge in ruling on the application. That circumstance, not the fact that the telegram criticized the judge, was the basis of the contempt proceeding and of the decisions by the state courts which found Bridges guilty.

The prosecution against the *Los Angeles Times* was a direct outgrowth of the Bridges case, for it was started by the Bar Association to protect itself from the accusation that it had pursued Bridges because he was a labor leader. Thus Bridges and the *Times,* until then probably never agreed on any subject whatever, found themselves allied in fighting to uphold freedom of speech and of the press. The case against the *Times* rested on various editorials it had printed, each of which had

some relation to a judicial proceeding. When the *Times* denounced the contempt prosecution, the Bar Association promptly charged that its editorials on that subject were also in contempt because tending to discourage "officers of the court" from doing their duty. This particular concern of the Bar Association for its own honor was too much for the supreme court of California. But it sustained the convictions for contempt based on three of the original editorials. Two of these commented on jury verdicts at a time when various matters were awaiting consideration by the trial judge; the third denounced two persons who had been convicted and, before they were sentenced, stated that the judge in the case would "make a serious mistake" if he granted them probation and failed to send them to prison.

The United States Supreme Court divided 5–4 in the decisions upon this last *Times* editorial and the Bridges telegram. But the Court was unanimous in declaring that the punishment of the *Times* for publishing the other two editorials violated the constitutional protection of freedom of the press. Even so, the judges differed regarding the formula to be applied in giving this protection.

For the minority, Justice Frankfurter stressed the importance of a judiciary free from outside pressure:

> Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials.

He acquiesced in the convictions because he thought the publication of the Bridges telegram and of the probation editorial constituted "a real and substantial manifestation of an endeavor to exert outside influence." He stressed the facts that the *Times* was a powerful newspaper and Bridges a powerful labor leader and he commented on the wide public interest in the two cases which had been referred to in the telegram and the editorial. Chief Justice Stone and Justices Roberts and Byrnes agreed with him.

On the other hand, Justice Black, for the majority, rejected

the notion that comment could be punished merely because it related to a pending case of importance:

> No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.

He sharply disagreed with the minority view that the publications were obstructive of justice. He condemned as inadequate the state court's criterion that a publication could be punished if there was a "reasonable tendency" that it might obstruct justice. Instead he applied the "clear and present danger" to this field of the law. The harm which the state had a right to prevent must be "extremely serious" and the "degree of imminence extremely high" before words could be punished. That, said Justice Black, was the "minimum" protection afforded by the Bill of Rights. In this notable advance in the law of civil liberties, Justice Black was supported by Justices Reed, Douglas, Murphy, and Jackson.

"Fighting Words"

From time immemorial persons have been arrested for "disorderly conduct" because of words spoken by them which "tend to cause a breach of the peace." Such offenses are treated as minor ones, generally tried by police magistrates without juries. They seldom reach the United States Supreme Court. But in the early 1940's it considered two such cases. In the Cantwell case a Jehovah's witness was convicted in Connecticut for disorderly conduct because he had played a phonograph record which attacked the Catholic Church; in the Chaplinsky case another Jehovah's witness was convicted in New Hampshire because he accused a policeman of being a fascist and racketeer. The United States Supreme Court unanimously reversed the first and affirmed the second of these convictions. The difference lay in the fact that the remarks on the record played by Cantwell were not directed at anyone in particular, permission to play the record had been obtained,

and there was no "clear and present danger" that violence would result; whereas Chaplinsky had used "fighting words" directly aimed at a particular individual and in his presence, so that retaliation and breaches of the peace were likely.

Sedition

Sedition is the stormy petrel of this part of the Bill of Rights. Prosecution for criticism of government had been one of the chief occasions for a guaranty of freedom of expression. Yet prosecution for such criticism continues to be the chief respect in which it is claimed the Bill of Rights has been violated. These prosecutions began almost immediately upon the adoption of the First Amendment, after the enactment of the Alien and Sedition Law of 1798. They were renewed during and after the First World War. They are again in full swing during the Second World War. The constitutional issues were all developed as the result of the second group of prosecutions. For Jefferson's pardoning of those convicted under the Alien and Sedition Law avoided any test of its constitutionality in the United States Supreme Court.

But in the years following the First World War the Supreme Court laid down certain rules which as yet remain unchanged, although not unchallenged. The problem first arose in connection with that part of the Espionage Act of 1917 which punished anyone who "caused" or "attempted to cause" insubordination in the armed forces or obstruction to recruiting. Numerous Socialists were prosecuted because of speeches they had made or pamphlets they had written which protested against the war and the draft. Schenck, the secretary of the Party, and Eugene V. Debs, its leader and ofttime candidate for President, were both convicted and served jail sentences. In upholding the Schenck conviction, Mr. Justice Holmes, speaking for a unanimous Supreme Court, laid down the "clear and present danger test" which we have already quoted.

This test proved imperfect in its application to later cases. Justices Holmes and Brandeis dissented from several Supreme

Court decisions because they believed that the statements involved had not been uttered under circumstances of "clear and present danger." The most shocking of these cases was that of a group of Russians sentenced to twenty years' imprisonment for distributing circulars protesting against the American expeditionary force which was sent to Archangel in 1918. The majority of the Court justified the conviction on the ground that the Russians urged a lessening of the war effort which might benefit Germany; the minority believed that the accused were motivated only by a desire to help the Soviet government with which we were not at war. This difference among the judges was not really a difference in constitutional principle. We have already quoted Justice Holmes's eloquent statement of his faith in freedom of expression.

The rule of "clear and present danger" was soon further weakened by the Gitlow and Whitney decisions which upheld state criminal anarchy and criminal syndicalism laws that punished the advocacy of the violent overthrow of the government. The majority of the Supreme Court said that when a legislature had concluded certain kinds of words were harmful to the state, there was a presumption that its conclusion was justified by the facts; hence there was no occasion to consider the clear and present danger test or the circumstances under which the words were uttered in the particular case. Justices Holmes and Brandeis again dissented. They agreed that the laws in question were within the power of the legislatures to enact and that it must be assumed that conditions existed at the same time of their passage which justified their adoption. But when such a law was applied to a particular defendant, they insisted he had a right to show, if he could, that at the time when the questioned statements were made there was not in fact any clear danger that what he said or advocated would produce a violent revolution.

Without considering at all the clear and present danger test, the Supreme Court, just after the First World War, upheld a state statute which punished the advocacy of the view

that persons should not assist in the prosecution of the war. This statute had been applied to a person who said that "we had better make America safe for democracy first" and "if they conscripted wealth like they have conscripted men this war would not last over forty-eight hours."

During the Second World War the Supreme Court unanimously struck down a Mississippi law which punished the distribution of literature "calculated to encourage disloyalty." The case arose on prosecution of several witnesses of Jehovah for distributing their literature, and of one of them for making derogatory remarks about President Roosevelt. Three judges of the state's highest court believed that the war emergency justified the prosecution; three others that the law was clearly unconstitutional. In the United States Supreme Court Mr. Justice Roberts said:

> The statute as construed in these cases makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophecies concerning the future of our own and other nations. As applied to the appellants it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our Government. What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs.
>
> Under our decisions criminal sanctions cannot be imposed for such communication.

This case, however, throws no light on the recurrent problem of membership in an organization charged with advocating illegal doctrines. Most of the laws which punish advocacy of the forcible overthrow of the government also punish membership in an organization which so advocates. Prosecutions on this score generally have been confined to left-wing parties. These prosecutions rest in the main on literature which is

universally circulated. The *Communist Manifesto,* issued in 1848 by Marx and Engels, figures in almost all the cases, chiefly because of its concluding paragraph which urges the workers to arise and throw off their chains. Various books and articles by Lenin, Stalin, and Trotsky also have figured in some instances.

The basic question in these cases is whether the revolution under discussion is to be a violent one and whether the party under attack "advocates" the desirability of violence as a means toward accomplishing such a revolution or merely predicts the inevitability of such violence because of the unwillingness of the owners of property to permit the majority of the people to install socialism. In the Gitlow case the Supreme Court noted this problem and concluded that the *Left-Wing Manifesto,* for the writing of which Gitlow was prosecuted, went far beyond prediction. In the Schneiderman case the Supreme Court avoided deciding whether the Communist Party advocated violent revolution. Later the Circuit Court of Appeals for the Eighth Circuit unanimously ruled that the Socialist Workers Party did advocate violence, and the Supreme Court refused to review the decision.

It is clear, however, that in any case in which the policies of a party or other organization form the basis of the prosecution there must be proof that the organization does advocate illegal doctrines. Nothing on this head may be assumed to be generally known, even if it has been proved to the satisfaction of other courts in other cases. The usual means of proof is the testimony of a former member of an organization who identifies various publications as reflecting its views. Without such a witness or proof that the defendant before the court accepted the documents as authoritative, no conviction can be sustained which rests on the documents alone.

In 1940 a number of Communists were convicted in Oklahoma on charges of membership in an organization which advocated the overthrow of the government by force; for it was claimed that the Communist Party was such an organization.

Proof of its views was established by a mass of documents in no way vouched for by any witness. The Court of Criminal Appeals reversed the convictions because of the absence of proof of what the Party stood for. The Court also ruled that the defendants were entitled to have the jury determine whether the principles of the Party were such as to present a "real and imminent danger" of violence, sabotage, or other unlawful acts.

Advocacy of the forcible overthrow of government, or membership in an organization said to advocate such a revolution, has formed the basis not only of criminal prosecutions but also of deportation proceedings and of suits to cancel naturalization certificates.

In 1938 a proceeding was instituted to deport Harry Bridges, the leader of the West Coast longshoremen, on the ground of his membership in the Communist Party, a membership he disputed. While this case was pending, the Supreme Court decided, in the Strecker case, that the law then in force permitted deportation only of persons who were at the time of the proceedings members of organizations which advocated the forcible overthrow of government. James M. Landis, then dean of the Harvard Law School, heard the evidence and believed Bridges' denial of present membership. Then Congress changed the law and made previous membership ground for deportation. Under the new law a second proceeding was brought, in which Judge Sears, formerly of the New York Court of Appeals, accepted the testimony of two persons with regard to Bridges' membership in the Party. Although the Board of Immigration Appeals concluded that these witnesses were not worthy of belief, Attorney General Biddle adopted the finding of Judge Sears and ordered Bridges to be deported. Bridges then sued out a writ of habeas corpus. The District Court denied the writ, though rejecting the testimony of one of the two persons on whom both Judge Sears and the Attorney General had relied.

William Schneiderman, who had been active in the Communist Party in California, became a naturalized citizen at a

time when the law barred from citizenship aliens who belonged to organizations which did not believe in organized government. At that time the law did not bar persons who belonged to organizations which advocated the overthrow of the government by force. Schneiderman was asked nothing about membership in the Communist Party and he said nothing about it. More than ten years later the government brought suit to revoke his citizenship, on the ground that the failure to disclose membership in the Communist Party constituted a fraud and on the further ground that such membership was so incompatible with the oath to support the United States Constitution as to make the grant of citizenship illegal. In the Supreme Court the case was argued on Schneiderman's behalf by Wendell Willkie, shortly after returning from his trip to Russia and China in 1942.

In both cases there were findings that the Communist Party advocated the overthrow of the government by force. In both the contention was made that there could be no attribution to the individual of doctrines attributed to the organization without proof—in each case wholly lacking—that the individual himself believed in the overthrow of the government by force or knew that the organization advocated such action. In the Bridges case it was further urged that there could be no deportation in the absence of a showing that there was a clear and present danger that forcible overthrow would result from the activities of the Party—in other words, that an alien cannot be deported for doing things for which he could not, under the Constitution, be punished under the criminal law. The government contended that the power to deport is more extensive than the power to punish. The precise issue has not yet been determined by the Supreme Court.

In the Schneiderman case the majority of the Supreme Court did not pass on the doctrines of the Communist Party, but held merely that in case of dispute concerning the character of the doctrines that the Party advocated, citizenship could not be revoked without proof that illegal doctrines had

actually been advocated by the applicant for citizenship. Chief Justice Stone and Justices Roberts and Frankfurter dissented. In the majority opinion Justice Murphy said:

> There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. . . .
>
> We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation. So uncertain a chain of proof does not add up to the requisite "clear, unequivocal, and convincing" evidence for setting aside a naturalization decree.

Justices Douglas and Rutledge each wrote separate concurring opinions. That of Justice Rutledge is of special interest because he dwelt on the coercive effect on the freedom of the naturalized citizen of the possibility of proceedings for revocation of citizenship such as this one, based as it was on affiliations and ideas.

The Chief Justice thought the lower courts were justified in finding that Schneiderman was not attached to the principles of the Constitution, saying:

> The question is not of petitioner's opinions or beliefs—save as they may have influenced or may explain his conduct showing attachment, or want of it, to the principles of the Constitu-

tion. It is not a question of freedom of thought, of speech or of opinion, or of present imminent danger to the United States from our acceptance as citizens of those who are not attached to the principles of our form of government.

. . . it is not questioned that the ultimate aim of the Communist Party in 1927 and of the years preceding was the triumph of the dictatorship of the proletariat and the consequent overthrow of capitalistic or bourgeois government and society. Attachment to such dictatorship can hardly be thought to indicate attachment to the principles of an instrument of government which forbids dictatorship and precludes the rule of the minority or the suppression of minority rights by dictatorial government.

A man can be known by the ideas he spreads as well as by the company he keeps. And when one does not challenge the proof that he has given his life to spreading a particular class of well-defined ideas, it is convincing evidence that his attachment is to them rather than their opposites. In this case it is convincing evidence that petitioner, at the time of his naturalization, was not entitled to the citizenship he procured because he was not attached to the principles of the Constitution of the United States and because he was not well disposed to the good order and happiness of the same.

It should further be noted that some of the cases which arose during both the First and the Second World War involved not sedition in any strict sense, but the alleged advocacy of military disaffection or insubordination. There can be no doubt of the power of Congress to punish incitement to mutiny in the army or navy. The difficulty with many of the prosecutions carried out in wartime is that persons are sent to jail merely for general expressions of opinion hostile to the war or critical of the war effort. This danger, already inherent in the Espionage Act of 1917 which is effective only in wartime, was greatly increased by the enactment in 1940 of the Smith Alien Registration Act. The latter made criminal the advocacy

of the overthrow of the government by force; the advising, urging or causing of insubordination, disloyalty, or refusal of duty in the armed forces; and the distribution of any printed or written matter to that effect. It is operative both in peace and war. Members of the Socialist Workers Party were prosecuted and convicted under both of the provisions of the law on the basis of statements made by them before Pearl Harbor.

Further light on the meaning of the prohibition against causing disaffection in the armed forces is thrown by a comparison of the Hartzel and Gordon cases. In both it was charged that attempts were made to cause disaffection in the armed forces because of statements made after the United States was at war. In the Hartzel case these statements were anti-British, anti-Jewish and anti-Roosevelt; they were pro-German, but not pro-Japanese; they made no specific reference to the armed forces. In the Gordon case the statements were pro-Japanese and were aimed at the Negroes; they specifically urged the Negroes not to fight for the United States in the war against Japan. The Circuit Court of Appeals for the Seventh Circuit affirmed both convictions. The United States Supreme Court granted a review in the Hartzel case but not in the Gordon case.

Material found to be "seditious" has frequently been barred from the mails, or this finding has resulted in the revocation of a periodical's second-class mailing privileges. During the First World War many Socialist publications, including the *Masses* and the *Milwaukee Leader,* were barred. During the Second World War the Postmaster General announced his intention of revoking the second-class mailing privilege of Father Coughlin's magazine *Social Justice,* which suspended publication rather than fight the decision. There is indeed little hope of judicial review in cases of this kind since, in the *Milwaukee Leader* case, the Supreme Court gave the Postmaster General wide powers of suppression. The Post Office also declared nonmailable a book written in 1939 by Lawrence Dennis, the well-known American fascist. In 1943 the second-

class mailing privileges of the Trotskyite publication, *The Militant,* were revoked.

There are a few other cases in this field which require brief mention. The Supreme Court reversed the conviction of Yetta Stromberg for displaying a red flag in California because the California law punished her display as being "in opposition" to government, and such general language might apply equally to a manifestation of hostility by perfectly lawful means. Likewise the young Negro organizer, Angelo Herndon, was ultimately freed after conviction under a Georgia law aimed at insurrection, because the law was too vague and the state had failed to prove that Herndon himself had advocated any unlawful doctrine. He was charged with inciting to insurrection through solicitation of membership in the Communist Party and the distribution of booklets. One of these advocated the establishment of a black belt in the United States where Negroes were to have the right of self-determination. Such advocacy, according to the state courts and the minority in the Supreme Court, necessarily involved the use of force since the desired objective could not be accomplished by peaceful means. But the majority, led by Justice Roberts, avoided a decision on that point, holding that the charge of inciting to insurrection could not be supported by the booklet in question since there was no evidence that Herndon had advocated the establishment of such a black belt or even that any of the persons he had solicited to be members knew that the establishment of such a belt was being urged. Justice Roberts rejected the position taken by the state that speech might be punished because it had a dangerous tendency, and made clear that the power of a state to punish speech might be exercised only under exceptional circumstances.

"Race Hatred"

Tolerance and equality of races and religions, though not observed as much as preached, are essential features of American democracy. Since 1933 various groups have, indeed,

preached the contrary doctrine. To some extent they have drawn inspiration from Nazi Germany, to some extent they have but gathered up ideas long cherished in parts of our own country. In general these groups preach anti-Semitism and white supremacy. They have aroused widespread antagonism. Those who have attempted to counteract the baneful influence of such preachments have, not unnaturally, sought the aid of legislation. In various states laws were proposed to make criminal any public statement which "promotes" hatred or hostility against any group by reason of its race, color, or religion and also to penalize those who belong to organizations advocating such doctrines or who distribute literature of the proscribed character. These bills were opposed by liberal groups such as the American Civil Liberties Union on the ground that they would interfere with free expression of opinion; the evil aimed at could be met in other ways such as counterpropaganda and punishment for incitement to violence. The bill was defeated in New York but passed in New Jersey. The law was first applied there to witnesses of Jehovah because of remarks they had made derogatory to the Catholic Church; however, the prosecution was dropped. Later, when the law was invoked against several members of the German-American Bund, it was held unconstitutional.

The New Jersey Supreme Court held that the law was too vague to be enforcible and that the words complained of in the particular case were not spoken under circumstances indicating a "clear and present danger" that breaches of the peace or other harm to the state would result. It is encouraging to find state courts so solicitous of freedom of expression, recognizing that the expression of an opinion, however hateful that opinion may be, cannot be punished except when it incites to violence or when there is imminent danger that violence will occur.

Labor Cases

Various free speech issues have arisen in labor controversies. The extent to which peaceful picketing has come under the free speech guaranty of the Constitution will be discussed in the chapter dealing with labor's rights. Here we shall consider cases affecting the rights of employers, which have arisen under the National Labor Relations Act.

The Associated Press was cited before the Labor Board on the charge that it had dismissed an editorial writer, Morris Watson, because of his union activities. The Associated Press complained that its freedom of press would be infringed were it compelled to re-employ this man, because conflict between the policies of the union and of the news agency might be reflected in the editorials he wrote. The majority of the Supreme Court rejected that contention while maintaining that there was nothing in the National Labor Relations Act which prohibited an employer from discharging an employee if his bias prevented him from carrying out instructions. In this case, however, the court decided that the discharge had not been so motivated, but had resulted from the employer's bias against organized labor. The four conservative justices then on the Court—Van Devanter, McReynolds, Sutherland, and Butler —dissented on the ground that there had been interference with freedom of the press.

The problem of an employer's freedom of expression has figured in several other Labor Board cases—cases in which the Board was concerned with statements hostile to the union involved. The right of an employer to publish his views to the world at large is not under dispute since the Board has not attempted to curtail that right in any way. When the hostile attitude is communicated directly to the workers, however, then the question arises whether the statements made are of such a character or were made under such circumstances that they can be considered coercion by the employer of the employees. No question of free speech arises when the employer

says he will discharge anyone who joins the union. Such a statement is a threat against the exercise of a right protected by Congress, the right to organize, and it does not constitute an expression of opinion guaranteed by the Constitution. On the other hand, when a statement is not coercive on its face, the coercive effect depends on the setting of the statement.

Three schools of thought are represented here: those who believe noncoercive expression of opinion must always be permitted; those who consider this a contradiction in terms, because the power of discharge makes every statement of opinion directly made to an employee necessarily coercive; and those who believe the employer's right to circulate such opinions as these to be dependent upon the circumstances—that is, only where such circulation is part of a pattern of wrongful acts should it be prohibited.

The first school of thought lacks a realistic approach because it is impossible to isolate words from their setting. If an employer has a record of discharging union organizers and beating them up, it is idle to say that his words were not intended to coerce the rank and file, even though no actual threats are to be found in the language he used. To permit such an employer to continue to spread anti-union propaganda merely because he had stopped engaging in unlawful acts would be scant reassurance to timid employees. The second view disputes the right of an employer to use persuasion at all; it ignores the protection given to employees by the National Labor Relations Act. It has not been accepted by the courts.

This brings us to the third view—that the employer's right to circulate his opinions depends on the circumstances. The fact that an employer has been guilty of discriminatory discharges justifies the inference that, when he spreads anti-union views, he is really using his power of dismissal in order to intimidate. Surely it is no infringement of any constitutional guaranty of free speech to prohibit the distribution of anti-union propaganda under these circumstances. In the main,

such has been the position taken both by the National Labor Relations Board and by the courts.

The issue has been most dramatically presented in the various Ford cases in which the Board found numerous wrongful acts by the employer: espionage, violence, intimidation, and discriminatory discharges. Viewed against such a setting the distribution of anti-union literature was clearly coercive. The Ford company's complaint to the contrary rested primarily on its objection to the findings that it had committed unlawful acts. The Board's position was most clearly stated in the Ford case which arose in St. Louis:

> . . . nor was the respondent addressing an argument to the intellect of its employees which they were free to accept or reject without compulsion. The respondent was not attempting to engage in the "free trade in ideas . . . in the competition of the market." On the contrary it was issuing a stern warning that it was bitterly opposed to the Union and that it would throw the weight of its economic power against the efforts of its employees to form or carry on such an organization. The respondent's right so to interfere with, restrain, and coerce its employees is not sanctioned by the First Amendment.

In the Ford-Detroit case the Circuit Court of Appeals for the Sixth Circuit set aside the provision of the Labor Board's order which forbade the dissemination of anti-union propaganda. The Court ruled that the Ford publications objected to by the Board were not coercive in their terms. It rejected the Board's contention that they became coercive because of their setting. Judge Simons said that the number of employees discriminated against was too small in relation to the total number employed to justify a finding of coercive intent in connection with the distribution of the literature.

A somewhat different approach was manifested by the Circuit Court of Appeals for the Second Circuit which upheld a Board order based in part upon statements by one of the employers that the union was a "bunch of racketeers" and that,

if the plant was organized, it would be unable to operate for more than six months or a year. Judge Learned Hand said:

> Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them: but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

The whole subject of an employer's right to discuss union matters with his employees has been considered by the United States Supreme Court only once. In the Virginia Electric and Power Company case the employer had posted on its bulletin board a long analysis of the rights of the employees, indicating that they could join a union without fear of discharge but suggesting the desirability of dealing directly with the company. This was followed by speeches to like effect, by the organization of an independent union which the Board found was company-dominated, and by the discharge of certain employees active on behalf of the C.I.O., discharges which the Board found were discriminatory. The Board decided that the posting of the notice on the bulletin board was an unfair labor practice, but it did not order the employer to stop making such

statements, as the Board had done in the Ford and other cases. The Circuit Court set the Board's order aside. The Supreme Court reversed the decision.

The unanimous judgment of the Supreme Court, announced by Mr. Justice Murphy on December 22, 1941, was hailed in the press as an employer victory. Actually it was an employer defeat since the Supreme Court rejected the Circuit Court's decision refusing to enforce the Board's order. The Supreme Court remitted the case to the Labor Board because it was not sure whether the Board's criticism of the employer's action in posting the notice and making the speeches had been based on the notice alone or had taken into consideration the other circumstances of the case. Clearly, the implication of the Supreme Court is that the Board's action would have been sustained had it rested its action on all the facts. But the Court felt that the utterances taken by themselves were not coercive, although their effect might be altered "by imponderable subtleties"; these, however, it was for the Board not the Court to appraise.

Mr. Justice Murphy said:

> Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as

to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure."

This decision but points the way; it leaves much unsettled. Until the Supreme Court has passed on a number of cases in which the Labor Board bases its conclusions on employer utterances viewed in the light of all the circumstances, it is impossible to determine exactly to what extent the Court will uphold the Board in its appraisal of the relationship between the utterances and the acts of the employer.

In one case, however, the Supreme Court by refusing to review a decision of the Second Circuit Court of Appeals has indicated that noncoercive speech unaccompanied by any wrongful acts cannot be the basis for a Labor Board order. The American Tube Bending Company sent a letter to all its employees after the Board had ordered an election to determine the appropriate bargaining agency, and the president of the company, after calling all the employees together, made a speech to them. Both the letter and the speech constituted a temperate argument that a union would be against the employees' best interests, substantially identical in this respect with the Virginia Electric and Power Company case. Since there were no acts showing hostility to the union, the Circuit Court set the Board's order aside and did not send the case back to the Board for further consideration, as the Supreme Court had done in the earlier case.

Restraints on Distribution

Since advance censorship of the written or spoken word is prohibited, except in the rare instances of war information and obscenity, those who want to interfere with freedom of expression have tried to prevent the words used from obtaining circulation. Many attempts have been made to prohibit the circulation of printed matter on the public streets or from house to house, to require permits for such distribu-

tion, or to impose taxes upon it. Some of these attempts have successfully withstood attacks on constitutional grounds; others have failed to do so. It should be remembered, however, that many acts of suppression are the work of private not public agencies and are thus outside the scope of federal constitutional power. There are several important Supreme Court cases which limit the scope of public interference with the distribution of ideas.

First in point of time is the case of the American Press Company. This challenged a Louisiana law which imposed a tax on newspaper advertising, a tax so designed as to restrict the circulation of large newspapers rather than to produce revenue. In 1936 the Supreme Court unanimously held this law to be unconstitutional on the ground that interference with distribution was as much prohibited by the Constitution as interference with publication.

This principle was soon applied to various ordinances which were used to harass unpopular minorities. Local officials in widely scattered parts of the country found it convenient to use ordinances long on the books in order to restrict the activities of labor organizers, radicals, and especially the witnesses of Jehovah. These ordinances were of various types: some required a permit for the distribution of leaflets and gave the local official wide discretion in granting or withholding the permit; others, under the guise of preventing any littering of the streets, prohibited all distribution of leaflets on the streets; still others required the payment of occupational license fees. Cases involving ordinances of each type have come before the United States Supreme Court.

A Jehovah's witness was arrested in Griffin, Georgia, for distributing literature from house to house without having obtained the required permission. The Supreme Court unanimously reversed his conviction on the ground that freedom of the press extended to distribution as well as publication, to pamphlets as well as to newspapers; and, because the municipal official had the right to withhold permission, the Court

ruled that the challenged ordinance amounted to that prior censorship clearly forbidden by the Constitution.

In California, Wisconsin, and Massachusetts the state courts upheld the convictions of various persons for distributing leaflets on the streets in violation of ordinances prohibiting such actions, on the ground that the ordinances were properly designed to prevent street littering. In two of the cases the leaflets distributed related to labor controversies, in the third they announced the holding of a meeting on behalf of the Spanish Loyalists. The United States Supreme Court, however, reversed all three convictions and held ordinances of this type void. Justice Roberts stated that the streets were the natural place for the distribution of leaflets and pointed out that other ways than the prohibition of distribution could be found to prevent littering.

When a group of cases reached the Supreme Court involving ordinances which imposed a license tax, the Court by a vote of 5–4 originally upheld the ordinances. These cases all pertained to the activities of Jehovah's witnesses. The question was whether ordinances which imposed occupational license taxes on peddlers or vendors of merchandise applied to the activities of the witnesses who, in connection with their distribution of literature, asked for either a contribution or the payment of a fixed price, but who would give the literature away to anyone desirous of having it who would not pay for it. State courts differed widely in their decisions on this subject. Some of them concluded that the activities of the witnesses did not come within the scope of the ordinances; others ruled that such ordinances were unconstitutional to the extent that they were designed to tax the distribution of ideas; still others held the ordinances both applicable and valid.

In June 1942, in Jones v. Opelika, the Supreme Court at first ranged itself with the last group. Justice Reed for the majority held that the activities of the witnesses were in effect commercial because money passed. The Chief Justice and Justice Murphy wrote separate dissenting opinions, with both

of which Justices Black and Douglas agreed. In their view, flat license taxes such as these had a restrictive effect on the distribution of ideas. The decision was the subject of widespread adverse comment in both lay and religious papers. A motion for rehearing called the Supreme Court's attention to this critical press. The American Civil Liberties Union, the Seventh Day Adventists, and the Newspaper Publishers Association filed briefs supporting the request for a rehearing. Just before the Court reconvened in the fall of 1942, Justice Byrnes resigned to become Director of Economic Stabilization. The motion was then held for many months by the evenly divided Court, awaiting the naming of the new justice. President Roosevelt picked Wiley Rutledge of the Court of Appeals of the District of Columbia. The choice indicated a reversal by the Supreme Court in these leaflet cases, since Judge Rutledge, in a District of Columbia case, had written a dissenting opinion which expressed the same views as those of the Chief Justice in the Jones case. Therefore it was no surprise that the rehearing in the Jones case was granted nor that the Supreme Court ultimately reversed itself, again by a 5–4 decision.

In the meantime other cases had come before the Court, one group from Pennsylvania revolving about the same kind of ordinance requiring "peddlers" to pay a license fee, another group from Ohio where the city of Struthers had enacted an ordinance prohibiting the ringing of doorbells by persons distributing handbills. The cases were all decided on May 3, 1943. Ten opinions accompanied the result, none of them by the judge whose vote determined the outcome. One of these was a brief per curiam opinion, merely announcing that the former decision in the Jones case was vacated; another was an opinion by the Chief Justice that criminal prosecutions such as these could not be enjoined.

Out of the multiplicity and confusion of these ten opinions two principles stand out: that flat license taxes on distributors are void because of their destructive influence on the right to exercise freedom of religion and freedom of the press; that

house to house distribution of leaflets cannot be altogether prohibited. In both cases the Court indicated that some regulatory devices might be approved: registration of vendors and distributors for purposes of identification; punishment of ringers of doorbells when the householder has indicated his unwillingness to be disturbed.

Justice Douglas' opinion in the Murdock case referred to the age-old form of distribution of religious tracts as a form of missionary evangelism, comparing it with the revival meeting in purpose and importance. Recognizing the right of the state to prohibit harmful practices, though covered by the cloak of religion, he pointed out that the ordinances involved in these cases were not directed against abuses or unlawful acts. Conceding that the state could prohibit the use of the streets for commercial distribution, he concluded that the mere fact that money passed "does not transform evangelism into a commercial enterprise." The opinion then considered the nature of the tax and concluded it was void because based on the exercise of a constitutionally protected privilege. Justice Douglas rejected the argument that only discriminatory taxes were void, saying that "Freedom of press, freedom of speech, freedom of religion are in a preferred position." He repudiated the suggestion that the abusive character of the leaflets distributed should be given consideration:

> Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Justice Reed, in his dissent, said that he could not understand the basis on which a property tax on a printing press or a gross income tax on a newspaper enterprise might be valid, but not an occupational tax on a distributor of the same pa-

pers. He said, moreover, that the decision forces a subsidy "notwithstanding our accepted belief in the separation of church and state," because municipalities could not require those engaged in distributing religious literature for money to pay part of the cost of policing their activities. He rejected the argument of the majority that the distribution was itself a religious exercise.

The separate dissenting opinion of Justice Frankfurter stressed the contention of counsel for Jehovah's witnesses that no tax, however trifling, could be laid on their activities. He said that it begged the question to say that the tax was on an exercise of a constitutional right; the question always is: to what extent does the Constitution extend its protection? To him the question was one of fact: did the tax actually suppress or control a right guaranteed by the Constitution? He said:

> Those who possess the power to tax might wield it in tyrannical fashion. It does not follow, however, that every exercise of the power is an act of tyranny, or that government should be impotent because it might become tyrannical. The question before us now is whether these ordinances have deprived the petitioners of their constitutional rights, not whether some other ordinances not now before us might be enacted which might deprive them of such rights. To deny constitutional power to secular authority merely because of the possibility of its abuse is as valid as to deny the basis of spiritual authority because those in whom it is temporarily vested may misuse it.

The decision in the Struthers doorbell ringing case turned on a narrow point: that the city had attempted to make a decision for all its inhabitants instead of leaving it to individuals to decide whether they wanted to be free from the annoyance of doorbell ringing. Justice Black pointed to the many varieties of house to house solicitation: by numerous religious groups, by labor organizations, by the government in War Bond campaigns, by political workers before election time, especially while seeking signatures to nominating petitions.

"Door to door distribution of circulars is essential to the poorly financed causes of little people." He suggested that a municipality could punish anyone who rang a bell despite an indication from the householder that he did not wish to be annoyed by itinerant preachers and the like. Justice Frankfurter concurred because he construed the ordinance as discriminating against what he said was "politely called literature."

Justice Murphy felt greater need to discuss the possible conflict between the exercise of religious freedom and the right to privacy in the home. But he concluded that "Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience" and indicated that if a city could ban the ringing of bells for the purpose of distributing leaflets it could prohibit door to door solicitation for charity and "the activities of the holy mendicant who begs alms from house to house to serve the material wants of his fellowmen and thus obtain spiritual comfort for his own soul." And he rejected the notion that the result might be different because of the vehemence of any particular religious zealot:

> If a religious belief has substance, it can survive criticism, heated and abusive though it may be, with the aid of truth and reason alone. By the same method those who follow false prophets are exposed. Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought.

Justice Reed found no basis in the construction adopted by Justice Frankfurter that the ordinance was aimed at the distribution of literature alone and felt, moreover, that the leaflet distributed was not "literature"—this leaflet announced a speech to be given by the late Judge Rutherford, at that time head of Jehovah's witnesses. Justice Reed insisted that the

City Council had the right to protect householders from the annoyance of being called to answer doorbells and pointed out that the ordinance in no way prevented the distribution of a leaflet "without signal to announce its deposit."

Justice Jackson noted in a dissent which covered the whole group of cases that in small communities the householder answers the doorbell himself and is not protected as are the Justices of the Supreme Court "from such importunities." He criticized the majority of the Court for not sufficiently considering whether the methods employed by Jehovah's witnesses do not impinge unduly on the rights of others.

Justice Jackson thought that the majority decisions had not been either clear or precise. He objected to stressing freedom of religion more than freedom of speech or of the press and protested against deciding constitutional issues "by a vague but fervent transcendentalism." He criticized numerous statements in the majority opinions and ended by a warning:

> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our Constitution which protects all—those in homes as well as those out of them—in the peaceful, orderly practice of the religion of their choice but which gives no right to force it upon others.
>
> Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want. Therefore we must do our utmost to make clear and easily understandable the reasons for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition.
>
> I think that the majority has failed in this duty.

These decisions round out the protection to which the distributors of ideas, be they religious or political, are entitled under the Constitution. States and municipalities may not bar distribution on the public streets or from house to house, may not vest arbitrary power in public authority to grant or withhold permission to make such distribution, may not prohibit all ringing of doorbells for that purpose, and may not impose flat license taxes upon the privilege of distribution even though money passes in connection with it. That leaves municipalities free to require the registration of persons who wish to distribute and perhaps to exact a moderate fee covering the cost of this registration. It leaves them free to limit house to house distribution and the ringing of doorbells to certain hours of the day, and probably to prohibit the ringing of doorbells altogether if the householder has, by some notice or other communication, indicated that he does not wish to be disturbed. Entry on private property for the purpose of distributing any printed matter, soliciting alms, peddling, or soliciting orders without the previous consent of the occupant of the premises may also be punished.

Distributors, like all other citizens, remain subject to general taxes such as property or income taxes. There is little reason to doubt that sales of literature would be subject to sales taxes imposed on sales generally. On the other hand, any attempt to discriminate against distributors of literature by taxes or other methods would be held invalid. Even the minority of the judges in the leaflet cases agreed to that view.

While the final conclusion was reached only after much travail and by the accident of the appointment of a new Justice, there is little reason to suppose that the Court will change its views on the points decided. These decisions, therefore, remain for the calculable future a guaranty of freedom of distribution.

On the other hand, even free distribution may be entirely prohibited on the public streets if the leaflet is commercial. That was decided in a case coming from New York City. The

owner of a submarine had placed it on exhibition and wished to call it to public attention by a leaflet. The police warned him that he might not distribute the leaflet on the streets. He sought an injunction in the federal courts and was successful in both the lower courts. But the Supreme Court unanimously reversed the lower courts on the ground that the constitutional guaranty of freedom of expression does not prevent a municipality from keeping business off the streets.

Difficulties are likely to arise, of course, in determining what is and what is not commercial. Since the New York decision held that a leaflet which calls attention to a physical object is commercial, it is clear that a leaflet advertising merchandise would also be considered commercial. In one case a state court characterized the leaflet that had been distributed as commercial because it announced a meeting at which admission was charged. The Supreme Court, however, ignored this aspect of the case and treated the leaflet as under the protection of the Constitution. Later the Supreme Court expressly ruled that an invitation to buy a religious tract does not make a leaflet commercial if its purpose is to convey ideas. As we have seen, in the Prince case, though by a five to four vote, the Court decided that a state can prohibit sales of leaflets on the streets by children. It is probable that free distribution by children could be prohibited also.

The Radio

Whether radio can be subjected constitutionally to government censorship is an undecided question. Except in time of war the government has attempted no direct censorship and even then the censorship has been no greater in scope than that imposed on newspapers. The Communications Act indeed expressly prohibits the Commission, which allocates wave lengths, from imposing any censorship.

Yet a certain amount of censorship over the radio inheres in the work of the Commission. Because of the physical limitations on the number of wave lengths and the necessity of

avoiding interference between stations, radio is subject to an amount of governmental control which would not be permissible under the Constitution in the case of newspapers or publishing houses. There can be no broadcasting station except by permission of the government, and that permission can be taken away. Indeed, the usual form of license extends for a short period so that each station must present itself periodically to the Communications Commission for renewal of its license. In connection with applications for renewal the Commission, under the law, considers the "public interest, convenience or necessity." To some extent the nature of programs already given will determine a station's status. Cases have arisen in which the Commission refused to renew licenses because of its objections to the programs that had been broadcast.

One such case was that of the Rev. Shuler whose comments on the Catholic Church were characterized as "sensational rather than instructive," with resultant denial of renewal. The Circuit Court upheld the Commission on the ground that Congress could refuse a privilege to one "who has abused it to broadcast defamatory and untrue matter." And the Supreme Court refused to review.

It is apparent from these instances that the power of the Commission to reject renewal applications actually operates as a censorship. Other stations will avoid broadcasting material of the kind objected to by the Commission lest it fail to renew their own licenses.

Theaters and Motion Pictures

Although what is shown on the stage and screen is often but a representation of what has already been distributed in printed form, the constitutional protection afforded the two mediums is altogether different. There may be no prior censorship of books or newspapers. In contrast, censorship of the theater and the movies is not forbidden by the Constitution

and in many places is established by law. So old is this attitude toward the theater that it appears never to have been successfully challenged. Censorship of motion pictures was unsuccessfully challenged many years ago in the Supreme Court. At that time the Court had not yet developed its present views on freedom of speech or on the extent of federal power over state laws.

Censorship of theaters and movies has been upheld on the theory that they are primarily spectacles, not mediums of expression. The power to affect the beholder of such a spectacle, the consideration that many persons participate in the experience, the circumstance that men and women, and often children as well, are in the audience—all these are elements which explain why shows have been placed in a different category from books.

This view has not prevailed without serious challenge. There is no doubt that both the theater and the motion picture are potent factors in the education of the people. As in other fields, the freest interplay of ideas and beliefs should be allowed. So far as the motion pictures are concerned, special consideration apply to newsreels. These certainly partake more of the newspaper than of the spectacle. Nevertheless, some courts have even justified prior censorship of newsreels. It is fortunate that the laws which permit censorship in advance of motion pictures now exclude newsreels from such censorship.

Perhaps the Supreme Court will some day reconsider its earlier decision with regard to motion pictures. There seems little reason for allowing the prejudices of censors to prevent audiences from seeing or hearing whatever is offered, subject to the penalties of the criminal law if the result is considered obscene or otherwise unlawful. Fear of punishment after the event would, in most instances, be sufficient to prevent violations of law, and the judgment of a jury on what is objectionable should be preferred to that of bureaucrats.

Academic Freedom

The right of a teacher to express himself freely in the classroom has slowly developed in the face of narrow political or sectarian objections. Originally the problem was a religious one. Fundamentalists objected to criticism of the Bible, to the teaching of evolution. The famous Scopes trial in Tennessee, in which Clarence Darrow and William Jennings Bryan faced each other, was the most spectacular manifestation of this phase of the problem. While Scopes ultimately won his case, it was on narrow technical grounds, not through any vindication of the broad principle involved. Since then the dispute has shifted to the political scene, and teachers suspected of leftist leanings have gotten into trouble. There has also been a persistent drive against textbooks having a progressive tinge.

This aspect of the situation was dramatized in 1937 when a Congressional committee held hearings in connection with a provision of law barring all teaching of Communism in the schools of the District of Columbia. Some of the absurd results of that prohibition then made manifest—such as the fear of the teachers to mention anything at all about Soviet Russia—resulted in its modification. Now only "advocacy" of Communism is barred.

The demand for academic freedom has, however, gone beyond its traditional confines. Teachers now ask the additional right to engage in utterances and activities outside of class without being penalized. Pupils in turn have demanded the right to join with one another into associations, to discuss the problems of the day, to invite speakers from the outside world. The depression and the threats of war which perplexed the younger generation in the early 1930's produced an activity among the students without precedent in our recent history.

All this ferment in academic circles found little reflection in judicial decisions. In some ways this is not surprising since teachers and pupils are generally loath to bring lawsuits. Moreover, their legal rights are few. Teachers often have no

tenure, and the courts have seldom interfered with the disciplining of students. It is difficult, for that matter, to get a clear-cut issue of academic freedom before the courts since the educational authorities almost always inject some question of personal conduct, some issue of moral standards. When the Board of Higher Education of the City of New York got rid of a number of teachers in the city colleges who had been accused of being Communists, the Board preferred charges of perjury, for these teachers had all denied that they were Communists when questioned by a legislative committee. Thus no court test of the basic question of the right of a Communist to teach became possible. Similar "red herrings" have prevented court review of license denials where the leftist inclination of the candidates seemed to be the real reason for the denial, but other reasons were advanced by the authorities. The difficulty is that the courts will not interfere with administrative decisions unless bad faith or arbitrary action can be shown. And judges practically never find these elements present when teachers espousing unpopular doctrines appeal for relief.

One famous case of refusal to permit a person to teach because of his views was that of Bertrand Russell. It was unique, moreover, since the educational authorities appointed him despite protests, but a judge barred him from teaching at the instance of a taxpayer, on the ground that Russell's views were immoral. The same judge refused to let Russell intervene in the proceeding to which he had not been made a party by the taxpayer. Then Mayor La Guardia instructed the city's lawyer not to take any appeal, and the courts rejected an appeal taken by the Board through independent counsel of its own choosing. Consequently, the merits of the case were never passed on by any high court and the original decision of Justice McGeehan stands as a monument to bigotry and prejudice.

Another interesting case arose in Wisconsin. The election of two members of a local school board was attacked on the ground that they had, before election, agreed to abide by the

principles of the American labor movement. Fortunately, the Wisconsin Supreme Court ruled that such attack was improper. School board members could not be removed because of political allegiance but only in the event of specific wrongdoing of which there was in this case no evidence.

Freedom of Assembly and Petition

THE right of people to gather together to discuss their problems and, by the pressure of that association, to influence their rulers was by many leaders of opinion thought so integral a part of freedom of speech that it did not require separate mention in the Bill of Rights. Yet suppression of meetings and reprisals against those who petitioned for redress of grievances had been so common that other views prevailed.

The First Amendment therefore concludes by providing:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

There has been practically no occasion for invoking the latter half of this guaranty. But there has been interference with the right of assembly. While interference with meetings held on private property has been rare, restrictions on meetings on the streets have been frequent and have taken numerous forms. There have also been laws directed at assemblies which do not actually meet but consist of persons bound together by similarity of opinion; many such groups are active in the United States. The Supreme Court has ruled that freedom of assembly is protected against state as well as federal interference.

Laws aimed directly at meetings on private property are rare. Some measure of control over such meetings is, of course, exercised by the power to license halls. Sometimes the authorities charged with responsibility for the safety of persons visiting a particular hall suddenly become aware of fire hazards or other defects not noticed until a particular meeting is

scheduled to take place with the objectives of which they have no sympathy. Such censorial use of legitimate licensing power is clearly a denial of the constitutional right of peaceable assembly. Although it is seldom possible to obtain judicial action quickly enough to permit the holding of a meeting so banned, it is nevertheless worth while to take such cases to the courts. Valuable precedents are thus established. Sometimes damages can be obtained which will deter such improper official conduct in the future.

Many states have laws which punish the advocacy of the overthrow of the government by force, and some of these laws, such as that in Oregon, punish anyone who assists at a meeting held by an organization which advocates the proscribed doctrine. The question soon arose whether such a law applied to any meeting called by a so-called illegal organization or whether it applied only to a meeting at which illegal doctrine was being advocated. The Communist Party called a meeting in Oregon to discuss home relief and other local problems. At that meeting one of its members, Dirk De Jonge, spoke. He was prosecuted on the ground that the Communist Party advocated the overthrow of the government by force, and he was convicted and sentenced to seven years' imprisonment. His attorneys contended that he had committed no crime, for nothing that was said at the meeting violated any law. The Supreme Court of the United States unanimously reversed that conviction on the ground that the states could not punish anyone merely because of the auspices under which he spoke. It is important to notice that De Jonge was not prosecuted because of his membership in the Communist Party; the Supreme Court, therefore, did not pass on the state's right to punish for such membership. Chief Justice Hughes said:

> It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peace-

able political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

For a long time it was supposed that there was no federal constitutional barrier to state or municipal regulation or even prohibition of meetings on public streets and in parks. This belief stemmed from a Supreme Court decision upholding a Boston regulation which required a permit for speaking on the Common. That decision, however, rested only on the ground that Boston owned the park, that none of its residents had any property interest in it. No issues of free speech or free assembly were discussed, nor did it appear that the purpose of the ordinance was to restrict free discussion.

Many municipalities have attempted to limit meetings on streets and in parks. Sometimes all street meetings were forbidden; in other cases permits were required. Many of these regulations were honestly motivated—in order to prevent interference with traffic or to make it possible to give police protection when needed. In other cases the purpose of the regulations was to prevent "undesirables" from holding meetings. Such was notably the situation in Jersey City where Mayor Hague had declared war on the C.I.O. and its supporters. He not only refused to allow them to hold meetings but had his police "escort" speakers and sympathizers out of the

city. Under the guise of protecting the community from disorder attendant on the meetings of unpopular groups, Jersey City enacted an ordinance which banned all street meetings except by permit from the Director of Public Safety. The ordinance gave the Director broad discretion to refuse a permit to "prevent" disorder.

Both the C.I.O. and the American Civil Liberties Union brought suit in the federal courts to enjoin the enforcement of this ordinance, claiming that they had been refused permits for holding meetings and that the withholding of such permits was without justification. The trial court granted an injunction against the enforcement of the ordinance. While the case of the American Civil Liberties Union was thrown out by the Supreme Court on the ground that it was a corporation without property interest in the controversy, the C.I.O. succeeded in having the ordinance held invalid because individual members joined as plaintiffs. With only seven judges sitting, the Supreme Court divided in various ways. Justices Roberts and Black and Chief Justice Hughes believed that the case was controlled by the privileges and immunities clause of the Constitution, because the union wanted to discuss its rights under the National Labor Relations Act; Justices Stone and Reed rested their conclusion on the due process clause. Justice McReynolds thought the federal courts should not interfere in the absence of a showing that the state courts would not enforce the Constitution; Justice Butler believed that the ordinance was constitutional.

The Court made clear, however, that public streets and open places may not be closed to lawful meetings merely because of a belief that listeners might use violence against the speaker. On this point the opinion of Justice Roberts was not questioned by Justices Stone or Reed. Justice Roberts said, referring to the ordinance:

> It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of

> Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.

The Court recognized, however, that meetings could be regulated for the "general comfort and convenience."

Parades and processions constitute a special form of assembly. They are less important than meetings, for they play no part in the deliberative process which is essential to the functioning of a democracy. Still, they can have great protest value and may be the only means whereby an unpopular minority can draw attention to its cause. Many courts have recognized this function of the parade and have interfered with arbitrary attempts to prevent or unduly limit the use of the streets for such purpose.

On the other hand, the very nature of a parade justifies a greater amount of public regulation and control than would be proper in the case of meetings. Unquestionably some public authority must have the right to prevent conflict in dates and routes, and to minimize interference with the everyday movement and ordinary business of the public. There may even be extreme instances where a parade might be forbidden altogether on the ground that it was planned as a provocation to acts of violence. Such action was taken in London when Sir Oswald Moseley's fascists wanted to parade through a quarter inhabited principally by Jews.

Only one case involving parades has been decided by the United States Supreme Court. That arose out of the refusal of Jehovah's witnesses to obtain a permit as required by New Hampshire law. The supreme court of that state had interpreted that law carefully to make clear that it could not be

used to discriminate against the unpopular or to interfere with freedom of expression. The United States Supreme Court, therefore, unanimously upheld the conviction of the group which had insisted on parading without having obtained the required permit. Chief Justice Hughes said:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

There are occasions of special emergency, both in peace and war, in which meetings may be prohibited altogether. Such occasions are usually signified by the declaration of martial law and accompanied by curfew regulations and other interferences with the free movement of the populace. Floods, earthquakes, riots, labor troubles, rebellion, invasion—these are among the happenings which have brought martial law in their train. If there really is an emergency with which the civil authorities are unable to cope, the courts will not scrutinize the particular acts taken by the military. The extent to which the courts will pass on the justification for the declaration of martial law still awaits clarification; this subject has already been more fully discussed. But if the courts should determine that there was no justification for the declaration of martial law, then any attempt to ban peaceful meetings would be void.

Although the United States Supreme Court has not expressly ruled that the right to join an organization is protected by the guaranty of peaceable assembly, it is reasonable to suppose that it will do so if occasion for ruling on the subject should arise. For an association of persons is but an extension of a meeting. It often comes into being as the result of a meeting, in order to perpetuate the ideas there expressed. Some form of organization is the only means by which people from different places can make their influence felt toward accomplishing the same objective. Surely the right to organize for any lawful objective must be protected by the Constitution.

Note the reservation: the organization must have a lawful objective. The member of a criminal gang palpably has no constitutional right to gather with his accomplices for the furtherance of their criminal aims, nor the right to form an organization for that purpose. But care must be taken in determining what organizational aims are unlawful. At the beginning of the nineteenth century it was unlawful for working men to co-operate to improve their wages. An organization for that purpose was therefore considered a criminal conspiracy. Today we have a different understanding of the value of labor unions.

There can be no doubt that if the objective of an organization is such that a legislature may constitutionally declare it illegal, then active participation in its objectives can receive no constitutional protection. We have seen, however, that participation in particular activities of such an organization cannot be punished unless these activities themselves are unlawful. An organization may have lawful objectives as well as unlawful ones.

Whether a person can be sent to jail merely because of his membership in an organization having unlawful objectives has not definitely been decided by the United States Supreme Court. In many of the states convictions for mere membership in the I.W.W. and the Communist Party have been upheld. There is also a statement in a Supreme Court decision to the effect that mere membership constitutes ground for punishment. But in all the cases in which the Supreme Court upheld convictions because of organizational connections, those convicted had been active, not passive members. This question is of considerable importance in deportation cases also, since the immigration laws require the deportation of anyone who has ever been a member of an organization which advocated the overthrow of the government by force. Often, as in the case of the Communist Party, there is a serious dispute about the objectives of the Party. Does it advocate violent revolution or merely predict that revolution will be forced on those who

desire a socialist society? Can a particular individual be sent to jail or deported because a jury or some court concludes that the Party advocated force? It would seem that no such result should occur without some evidence that the individual member understood that the Party advocated violence. Otherwise he would be held responsible not merely because of his associations but because of the interpretation placed on these associations by some judge, often many years after the time of membership.

To some extent the Supreme Court's decision in the Schneiderman case points in this direction. For there the Court held that without proof that an individual accepted illegal doctrines attributed to a party, the government might not cancel his naturalization certificate on the ground of membership in such a party. Yet the decision may have been influenced by the nature of the proceeding which imposes a special burden on the government. The same question is more sharply posed in the Bridges deportation case which has not yet reached the Supreme Court.

Even when the objectives of an organization are perfectly lawful, it may be regulated in the public interest. The boundaries of permissible regulation have not been defined. Only one case of this character has reached the United States Supreme Court. Upon the rebirth of the Ku Klux Klan after the First World War, New York, in an endeavor to find out who its members were, passed a law which required all organizations which exacted oaths of members to file a list of members. The law also punished for membership or attendance at meetings anyone who knew that the required list had not been filed. The Klan unsuccessfully challenged the law. The Supreme Court held the law to be a reasonable police measure, but did not discuss its impact on the right of assembly. Later the same law was invoked against the German-American Bund, but a new test of its constitutionality failed because the convictions were reversed on other grounds.

CHAPTER IX

Military Provisions

THERE were many occasions in English history, the latest of which occurred in the reign of James II, when the crown disarmed part of the population and quartered soldiers upon the people. Such acts produced resentment even in a settled country like England. That any government should practice them in the newly established American states was unthinkable. The American frontier was only a short distance beyond the mountains and the Indian was still a menace. Organized state protection did not exist. A man therefore expected to protect himself and openly carried arms. Moreover, experience had shown the value of an armed citizenry as a bulwark against tyranny. People looked to the local militia as protection against enemies abroad and potential despots at home. They distrusted a regular army, largely mercenary in character. Accordingly, after protecting rights of conscience and opinion in the First Amendment, the drafters turned their attention to these military problems.

The Second and Third Amendments provide:

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.
>
> No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

These two provisions are restrictions on Congress alone and have no application to the states. They have seldom been invoked and are now practically obsolete. It is significant that the drafters of the amendments, although motivated by dis-

trust of a standing army, did not go so far as to deprive Congress of the power to set one up, even in time of peace. When Congress establishes such an army, however, it must provide living quarters for it. With the gradual development of a small regular army, there came into existence in various parts of the country government reservations on which officers and men of that army were housed. Otherwise the Third Amendment has had no influence.

The Second Amendment was intended to protect the right to carry arms openly for public purposes and for protection against unlawful intrusion into the home. It was not designed to assist men to commit crime. Consequently the courts have approved various laws which prohibit the carrying of concealed weapons. The United States Supreme Court has upheld an Act of Congress which requires manufacturers or dealers in certain kinds of firearms such as sawed-off shotguns to register and pay an annual tax. The law had been attacked on the ground that it was not a revenue measure but an interference with the right to bear arms. On this score a lower federal judge held it unconstitutional. The Supreme Court unanimously reached a contrary conclusion. Mr. Justice McReynolds said that the Second Amendment did not guarantee the right to carry a sawed-off shotgun, there being no evidence to show that it had "some reasonable relationship to the preservation or efficiency of a well regulated militia." The Circuit Court of Appeals for the First Circuit extended this doctrine to a law which prohibited ex-convicts from possessing an ordinary revolver; it appeared in this particular case that the accused person had fired at someone with whom he had a disagreement—hardly a contribution to the efficiency of the militia.

Most of the litigation on this subject has occurred in state courts under state constitutional provisions similar to the Second Amendment. A few state courts have held unconstitutional laws which prohibited the carrying of arms openly. But the restrictions imposed by the various legislatures gen-

erally have been upheld. In this connection there have been some curious state decisions. For example, some men were convicted in Massachusetts for parading while carrying rifles which had been altered so that they could not be fired. The theory on which the conviction was upheld was that people would suppose the weapons could be used and might be moved to resentment. Some states, such as New York, have no constitutional provision on the subject at all. In these a permit can be required for the possession of any arms, and people have been punished even for the possession of obsolete ones.

CHAPTER X

Searches and Seizures

"EVERY man's home is his castle." That is an ancient maxim of English law. But the castle must yield to the power of a warrant issued by a judicial officer, a warrant to arrest a fugitive from justice or to seize stolen or smuggled property. In the late seventeenth century, when the infamous Star Chamber functioned in England, search warrants were used to ferret out evidence of sedition. Since the authorities did not know what they might find, they could not adopt the pattern which had been followed in searches for stolen property; they could not particularize the objects to be seized, but authorized the constable to take whatever he might find. In short, these "general" warrants became roving commissions which authorized the seizure of all the papers found in a suspect's home. For nearly a century the practice, though greatly disliked, remained unchallenged.

The first challenge, although an unsuccessful one, took place on this side of the Atlantic, in connection not with sedition charges but with smuggling. Smuggling had been a common practice both in England and in the colonies. During the French and Indian War illegal traffic with the enemy added to the troubles of the customs officers. In an endeavor to discover the participants in contraband business and to confiscate their goods, the authorities followed the example set in the mother country and placed general warrants in the hands of their officers. These warrants, called "writs of assistance," were hated in the colonies also. In 1761 James Otis, Attorney General in the colony of Massachusetts, resigned his office in order to be free to attack their use. In a speech of great eloquence he questioned the power of Parliament to authorize such

writs. The colonial court, almost persuaded, sent to England for advice, but on orders from the cabinet overruled Otis' contention and upheld the legality of the writs. This episode was much later described by John Adams as the first step in development of the opposition to the British crown that led to independence.

A few years later such general warrants were fought in England by John Wilkes. This persistent critic of the government did not remain content with protest when the authorities seized his papers under general warrants, in connection with prosecutions for seditious libels which had resulted from his publications. He and his associates sued the officers who had executed the warrants and recovered substantial damages. In these lawsuits the courts held that such "general warrants" were void and, moreover, laid down the principle that there could be no search of a man's home at all for papers to be used as evidence, but only for stolen property or other contraband material. Those rulings, accepted by the House of Commons, have stood as landmarks of English and American constitutional law. They are enshrined in the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fourth Amendment was intended to perpetuate both aspects of the doctrine established by the English courts: that warrants must be specific, and that they cannot be used to look for evidence. It assures protection of the privacy of the house and lessens the possibility of oppression or blackmail by public officials. It is significant that the amendment not only requires that certain specific particulars be observed before any warrant can issue, but that it also forbids "unreasonable searches."

The insertion of these words indicates that the amendment was intended to cover something more than the form of the warrant.

Does This Guaranty Affect State Courts?

The Fourth Amendment, like the other parts of the Bill of Rights, has no direct application to the states. The right to be free from unreasonable searches by officers of a state, unlike freedom of religion and the other rights guaranteed by the First Amendment, has not yet been brought under federal control through the due process clause of the Fourteenth Amendment. While the Supreme Court has described this right as "of the very essence of constitutional liberty," it has avoided passing on the oft-raised contention that due process is denied if a person is convicted of crime in a state court on the basis of illegally seized evidence.

In the Hague case the Supreme Court passed over an opportunity to clarify its position on this subject. The C.I.O. had complained of illegal searches and seizures by Jersey City police and had asked that these be enjoined by a federal court. The trial judge made no mention of this point in the injunction which he issued. In the Circuit Court of Appeals Judge Biggs concluded that the right to be free from unreasonable searches was part of due process. But the Supreme Court ruled this discussion outside the issues because no part of the injunction dealt with searches.

The Supreme Court might well hold that the right to be free from unreasonable searches was guaranteed by due process in the event that such right was ignored by a state court in an action for damages suffered from the search, yet hold otherwise, on procedural grounds, in a prosecution based on illegally seized evidence. For most states do not permit a person accused of crime to object to the reception as evidence against him of property illegally seized from him. They adhere to the view long ago advanced by the Supreme Court itself that

a criminal trial should not be interrupted in order to pass on the contention that evidence offered against the defendant had been illegally seized from him—a position later abandoned, as we shall see. The Supreme Court may be reluctant to hold that such a procedural ruling by a state court is so inconsistent with a civilized trial as to be a denial of due process. Moreover, it may be influenced by the fact that it has often noted a similarity between the Fourth Amendment and the right of a defendant not to be compelled to testify against himself—a protection against self-incrimination which the Court has ruled is not an essential part of due process.

It is possible that the Supreme Court might, however, review a state conviction which rested on illegally seized evidence if that particular state bars the use of illegally seized evidence after a motion has been made before trial for its return, but in the particular case under consideration refuses to follow its own general rule or incorrectly holds the seizure to have been a proper one.

There is one situation in which the federal courts definitely will scrutinize searches by state police officers—when they are made in co-operation with federal officials. But if a search is made by state police primarily for the purpose of using the evidence in a state prosecution, the evidence can be used at a federal prosecution no matter how improper the search may have been.

When Is a Search Not a Search?

The Fourth Amendment was designed to prevent abuses of the authority of government as represented in the officer who makes the search. It is that assertion of authority which makes a seizure easy of accomplishment, as a person will ordinarily yield to the command of a police officer and hand over the sought after article. Since the guaranty is directed at governmental action, it has no application to seizures by private persons, no matter how illegal such seizures may be. Naturally,

anyone who illegally takes papers of another can be prosecuted for such action. Just the same, the papers so seized by a private person can be used by the government in a criminal prosecution, unless it induced the seizure.

However, not all acts, even by federal agents, violate the constitutional guaranty. Such a violation occurs only when there is an illegal entry on property or something is actually taken away. To illustrate, there is no "search" if officers use their sense of smell to detect a still or their eyes to watch suspicious movements, though they use searchlights, field glasses, or telescopes to bring within range what otherwise could not have been discerned. The logic of this rule has been applied to more elaborate scientific devices such as to a microphone that hears through walls or to the tapping of telephone wires. It has been held also that the guaranty does not extend at all to open fields.

While the guaranty operates ordinarily to prevent forcible taking, the Supreme Court in at least one instance extended its scope to include a seizure by trickery. In that case, later described as the extreme to which the amendment would be stretched, an officer of the government obtained access to an office through claim of friendship and secretly removed some papers from a desk. The Supreme Court ruled this action to be a violation of the constitutional guaranty and reversed a conviction based on the evidence so obtained.

The Court has further extended the guaranty to cover situations in which there was really no search or seizure at all. In the famous Boyd case the Court held unconstitutional, as in violation of this amendment, a statute which permitted the forfeiture of property imported into the United States after the owner refused to produce invoices called for by the government. Justice Bradley said that this law in effect authorized an unreasonable search and that the claimant was compelled to testify against himself. The same opinion also accepted the rule established in the Wilkes cases—that there could be no search for evidence alone.

Search for Evidence Is Forbidden

Since all searches are made in the expectation of finding evidence that can be used at a criminal trial, the ruling that there can be no search for evidence sounds paradoxical. What the Supreme Court meant in the Boyd case and later ones, however, was that the Constitution forbids the seizure of things lawfully possessed, even under a search warrant. The expectation that an admission of guilt might be found in a letter or diary, for instance, does not justify seizing it. On the other hand, papers or other property can be seized if stolen or smuggled, or if used in the accomplishment of a crime.

This condemnation of the seizure of things, if the only reason for the seizure is to obtain evidence, rests in part on the privilege against self-incrimination, as there is a close relationship between the Fourth Amendment and this portion of the Fifth Amendment. The interrelationship of these two provisions has been criticized; indeed the value of the privilege against self-incrimination has been questioned. It is clear, however, that the Fourth Amendment was designed to incorporate the English rule established in the Wilkes cases. Any other interpretation of it by the Supreme Court would have been a denial of the expectation of the framers of the Bill of Rights.

Search Warrants

The Constitution requires that a warrant be issued only "upon probable cause" and that it specify the place to be searched and the things to be taken. If a search warrant fails to comply with these requirements, it is defective and the search conducted under it is illegal. Broadly it may be stated that in order to obtain a search warrant an affidavit must be presented which states facts sufficient to indicate that a crime has been committed and that the matter to be seized is contraband. Mere suspicion will not do. While it is not essential that the affidavit be made by someone who has personal knowl-

edge of all the facts, it is, in such a case, necessary to set forth the sources of the information relied on by the person making the affidavit.

The warrant cannot authorize a mere "fishing" excursion. It must be more specific. We must never forget that one of the motivating impulses of the Fourth Amendment was the English habit of issuing "general" warrants.

Subpoenas and Presumptions

This same distaste for general warrants led the Supreme Court in 1886 to hold unconstitutional an Act of Congress which provided that if an importer failed to produce certain invoices on demand of the district attorney, he was presumed to have admitted the charge against him. The decision of Mr. Justice Bradley in the Boyd case has long been considered a landmark in the field. He said:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

By analogy, the Court has condemned subpoenas that were too broad.

Not All Searches Without Warrants Are Bad

It seems to have been taken for granted that a police officer might search a man whom he had arrested. Indeed one might go further and urge that it is the duty of the officer to make such a search, not only to make sure that the suspect is not armed, but also to see if he has on his person any of the incriminating evidence of the crime, such as burglar's tools, contraband drugs or liquor, stolen goods, and the like. This very natural right to search the arrested person has been extended to the place where the suspect is arrested. Abuses are, however, likely to occur. For the officer rarely confines his search to weapons or contraband. He takes anything he finds, often harmless personal material, yet sometimes written documents which can be used to convict. For a long time it was supposed that the right to search at the time of arrest covered anything found. But in 1931 the Supreme Court ruled otherwise. It limited the searcher without warrant to material he could have taken if he had secured a search warrant. Documents which are not the instrumentalities of crime but which merely contain incriminating admissions can no more be taken during a search made at the time of arrest than they could be looked for under a search warrant.

Needless to say, a search incident to an arrest is valid only if the arrest was lawful. Ordinarily an arrest, like a search, must be authorized by a warrant. But again there are exceptions. Anyone may arrest a person found committing a crime. There are other circumstances under which arrests without a warrant are authorized even at a distance from the scene of the crime, as when the officer has reasonable ground for believing that the suspect is guilty. Although there is difference of judicial opinion regarding an officer's right to make an arrest if it turns out that in fact no crime was committed at all, these are subleties not essential to our present discussion.

Unless the search and the arrest are substantially simul-

taneous, the search will be held invalid. Thus it is improper to search a man's house when he has been arrested out in his fields. And it will not do to search a man and then arrest him because of what the search disclosed. In the latter case both the search and the arrest are illegal. There is, however, a notable exception. Because, in the days of prohibition, law enforcement agencies were flouted by the ease with which bootleggers could move their liquor by automobile, the law was stretched to meet the emergency. The Supreme Court held that a moving automobile could be searched and stopped when there was a reasonable basis for supposing that it was engaged in illicit traffic, and that the occupants could then be arrested if anything was found to justify the suspicion. While the decided cases refer only to automobiles, there is little doubt that their logic extends to other modern methods of transportation such as motor boats or airplanes.

Wiretapping and Similar Devices

Modern science has vastly increased the extent to which law enforcement officers can assist their senses in detecting crime. The use of the unaided senses has always been one of the chief means relied on to this end, with the eyes, ears, and nose the senses most often used. Smell still retains its primitive characteristic. One must be near by to make use of that sense, no long-distance methods of transmission having been developed. The eye's range has been extended, though only to a limited degree, by the spyglass and the high-powered binocular. But the user of these devices must be reasonably near the spot where he expects that a crime is about to be committed. What changes in this respect television may bring about is uncertain, although the elaborate machinery which must be set up to "catch" the vision will rarely lend itself to detective use.

It is a different matter so far as the ear is concerned. The telephone has made it possible to hear the spoken word at any distance. Wires are therefore used in a variety of ways as an

aid to crime detection. Tapping of ordinary telephone wires is the most common method. But there are special devices that can be used to catch conversations not conveniently transmitted on the wires. A detective may install a dictograph in the room where the conversation is to take place and, by means of attached wires, listen in comfort far away. Or, in exceptional cases, he may attach a powerful microphone to the outer wall of a room or building and hear the sounds picked up by means of this device, called a detectaphone.

The question has arisen whether such methods of invading a person's privacy are condemned by the search and seizure provision of the Constitution. In 1928 the Supreme Court held in the Olmstead case that wiretapping was not forbidden by the Fourth Amendment. Chief Justice Taft rested his conclusion on the narrow ground that since nothing had been taken away there had been no search or seizure. Justices Holmes, Brandeis, Stone, and Butler dissented on various grounds. Justice Butler expressed the opinion that there had been a physical interference which could aptly be considered a search, though perhaps not so aptly a seizure. Justice Holmes rested his dissent on the ground that in the state where the wiretapping had occurred such action was illegal. Justices Brandeis and Stone adopted the broader view that the Fourth Amendment should be so interpreted as to include all invasions of privacy. Justice Brandeis said:

> Moreover, "in the application of a constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every

> man in the hands of every petty officer," was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?

In 1942 the Court, in the Goldman case, reiterated its position in the Olmstead case and applied it to the detectaphone. Chief Justice Stone and Justices Frankfurter and Murphy thought the Olmstead case should be repudiated. The Court intimated that the use of a dictaphone or dictograph was probably illegal—at least if entry into the room where it was installed was obtained by force or fraud. In such a case there would have been a trespass, a physical interference which would bring the Fourth Amendment into play.

Justice Murphy pointed out that, even if the Olmstead case were overruled, Congress might provide machinery for obtaining a court order to authorize wiretapping in cases in which the need for it could be shown—a machinery similar to that long ago set up in connection with search warrants. Such a method for dealing with wiretapping was provided for in the New York state constitution in 1938. It ensures judicial review of the propriety of the tapping.

Although the Supreme Court has held that wiretapping does not violate the Fourth Amendment, Congress has provided protection against wiretapping in the Communications Act. In interpreting that law, the Supreme Court has held that its ban includes tapping by federal agents. Since then various Attorney Generals have tried unsuccessfully to get Congress to authorize tapping in certain kinds of crimes.

The Supreme Court has ruled that the ban on wiretapping applies whether the messages were interstate or only intrastate. And it has also ruled that if wires have been tapped information obtained as the result of such tapping cannot be introduced in evidence. Such evidence, said Justice Frankfurter, was "fruit of the poisonous tree." In any case in which

an accused person could show that there had been wiretapping, he was entitled to a preliminary hearing in court at which the material discovered as a result of the taps could be traced and its use at the trial forbidden. But that was a privilege available only to a person whose conversations had been tapped.

Methods of Enforcing the Constitutional Guaranty

It is probable that the framers of the Fourth Amendment expected that it would be enforced in one of the two ways which had been used within their own memory: when there was time to do so, legal proceedings might be taken to prevent the issuance of improper warrants; when the warrants had already been executed, then actions for damages might be brought. The success of Wilkes with this latter form of redress may have led to the belief that it would prove an important deterrent. But it later appeared that this was illusory. Instances multiplied of search warrants that did not comply with the requirements of the Constitution and of searches without any warrants for which there was no justification at all. Repeated efforts to prevent use of improperly seized property at criminal trials were unsuccessful because the courts took the position that they could not stop in the middle of a criminal trial in order to find out whether the seizure had been a proper one or not.

Then in 1908 a lawyer with imagination conceived the idea that if his client's property had been illegally seized by the authorities they should be compelled to return the property. That first attempt failed because the court ruled that the seizure was in fact a lawful one. A few years later a similar attempt succeeded and established a pattern which has been consistently followed in the federal courts and the courts of a large number of states. Since a person accused of crime could refuse to testify or to produce evidence in his possession, it then became impossible for the prosecution to use any material which it was required to return because illegally seized. Thus

a way had been found to give strong implementation to the Fourth Amendment and its counterpart in the various state constitutions.

A few years later one Weeks was convicted through the use of material which he claimed had been illegally seized from him. On appeal he urged that this use of his property, after an attempt had been made to reclaim it before the trial, violated the constitutional guaranty. The Supreme Court agreed, saying that if illegally seized papers could be used under such circumstances, then the protection of the Fourth Amendment was of no value and it "might as well be stricken from the Constitution."

From this position the Supreme Court has not receded. Indeed, it has modified its original rule that the legality of a search could not be inquired into at a criminal trial by requiring such an inquiry when it appeared that the defendant had no knowledge that there had been a search until the material taken was used at the trial. In this fashion the Fourth Amendment now prevents the use of evidence seized in violation of its terms in any criminal trial in the federal courts if an application has been made in advance of the trial to compel the return of the seized property or if the fact of the seizure is not learned by the defendant until the trial.

This rule has been much debated. Many commentators and judges have criticized it on the ground that it may permit guilty persons to escape conviction because of the blunder of police officers. As Judge Cardozo said while on the New York Court of Appeals:

> We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be

insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied.

The opposite view was well expressed by Justice Holmes:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

The question is one of general public policy. Shall convictions be obtained by methods which flagrantly violate the plain provisions of the Constitution or shall a few offenders go free and respect for law be maintained? In support of the latter view, which is accepted by the federal courts, it can be said that other suggested methods of enforcing the constitutional guaranty do not work. Suits for damages are rarely effective, criminal penalties are never applied to overzealous police officers. Moreover, it is not correct to speak of the criminal being let loose because of the constable's blunder. That seldom happens since the authorities are always given the opportunity of proceeding on the basis of evidence legally obtained. Nevertheless, it must be recognized that in many cases the evidence might have been seized under a search warrant; it seems unfortunate that the state should be deprived of evi-

dence which, with a little care, might have been available to it. It is also said that most of the victims of illegal searches are criminals, and there is no need for the courts to be so tender with them. This last argument, however, is fallacious. We hear only of the cases in which the jury has convicted. We know little of the illegal searches against innocent persons in cases in which the jury acquits, still less of those which never come to trial.

On the other hand, the possibility that use of illegally seized evidence will endanger a verdict of guilty operates as some curb on improper practices and thus protects all the people against invasions of their privacy and against potential blackmail. Judging by the number of reported cases on the subject, reversal of convictions based on illegal searches has not altogether prevented these improper practices, it is true. We return, therefore, to our basic philosophy of life. If we believe in efficiency at the cost of some liberty, we will reject the federal rule; if we think liberty too precious to yield even though efficiency be less than perfect, we shall insist on every possible implementation of the constitutional guaranties. Fortunately, the United States Supreme Court has ranged itself on the side of liberty.

Who Can Complain of Illegal Searches?

Not everyone may complain because evidence used against him was obtained by wiretapping or an unreasonable search. In the Goldstein case the Supreme Court decided that the use of evidence obtained by illegal wiretapping could be prevented only when the evidence was offered in an effort to convict a person whose conversations had been tapped. This case involved an insurance fraud. Some of the conspirators were confronted with conversations recorded as the result of the tapping of their wires, and in consequence testified against others whose wires had not been tapped. The convicted confederates urged that testimony obtained in that way was "fruit of the poisonous tree" of the wiretapping and therefore in-

admissible as evidence. The majority of the Supreme Court rejected the contention, pointing out that none of the intercepted messages had been used at the trial. The Chief Justice and Justices Frankfurter and Murphy again dissented.

The majority of the Supreme Court held that the rule should be the same as in search and seizure cases and approved, for the first time, the doctrine laid down by many lower federal courts which limited the privilege of complaining against an illegal search to the person whose house or office was invaded or whose property was seized. Consequently, a member of the I.W.W. had been denied the right to complain of an illegal search of the I.W.W.'s headquarters. The harshness of this rule has led to some exceptions. A person can object to the seizure of an article which does not belong to him if it was taken from him or from his home or office. And any member of a household, including an employee who lives in it, may complain of an illegal search of the home. But this exception has not been extended to the place of work of employees who do not also live where they work.

Finally, no one who has consented can object either to a search or to wiretapping. A search is not illegal if consented to at the time. However, consent will not be implied merely from silence. In the case of wiretapping the statute expressly authorizes tapping with the consent of the "sender." This has been interpreted to mean that all the parties to a telephone conversation must consent.

Indictment

SINCE tyrants have often sought to cloak their arbitrary desires under the guise of observing the procedures of the criminal law, the Bill of Rights contains many provisions aimed at restricting governmental power in this field. These safeguards are essential to liberty, even though they sometimes seem to hamper prosecution of the guilty. But the safeguard here under consideration is rarely open to any such criticism since it is designed to leave with a cross section of the community, the grand jury, the final decision whether to prosecute particular persons for serious crime. Without such protection a corrupt, arbitrary, or malicious prosecutor could put innocent persons to the ignominy, expense, and worry of criminal trials.

The institution of the grand jury is very old. At first, in England, it not only recommended cases for trial—that is, made "presentments" or found "indictments"—but also tried them. At the time of the adoption of the Bill of Rights, its functions had crystallized and were restricted to the first of these roles. It had proved a useful barrier against persecution by royal authority and it continues to serve as a mitigator of the law's harshness. Many a person technically guilty is never indicted because the grand jury thinks the public interest would be better served by forgetting the incident than by prosecuting. There are also occasions when the hostility of a particular community toward some law rather than sympathy for a particular individual completely blocks the enforcement of such a law. Under such circumstances no grand jury will indict.

The Fifth Amendment's first provision deals with this subject:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . .

The Fifth Amendment has no direct application to the states at all. In several of our states, such as Louisiana and California in which French or Spanish law had prevailed before they became American, prosecutions may be instituted without indictment in many criminal cases. Because the United States Supreme Court has refused to interfere with convictions in such states, this is one of the provisions of the Bill of Rights which has not yet been siphoned into the due process clause of the Fourteenth Amendment.

This guaranty is likewise inapplicable to insular possessions such as Hawaii and Puerto Rico, since the Supreme Court has ruled that Congress might determine how much of the Constitution should control there. But a contrary result has been reached in the case of Alaska, since the Court has held that territory to be an integral part of the United States.

There can be no prosecution in the federal courts for a crime punishable by death except after indictment. That is clear as to ordinary persons, whether citizens or aliens. There is an exception, however, with regard to the armed forces which has caused some discussion. And since the Constitution does not specify what are the other "infamous" crimes for which an indictment must be secured prior to prosecution, it has remained for the courts to define the term.

The Supreme Court has fairly well defined the class of crimes considered so serious as to be included within the term "infamous." Two conditions have been laid down. A crime is infamous if the convicted person may be required to do hard labor; likewise, it is infamous if he may be sent to a

penitentiary rather than a workhouse or a county jail. It is strange that neither the character of the offense nor the length of the imprisonment has been made the determining factor. Thus punishment of sixty days in a penitentiary for the offense of being unlawfully in the United States and punishment of six months at hard labor in a workhouse for the offense of neglecting minor children have both been set aside because the prosecutions were not instituted by indictment. In the latter case Chief Justice Taft and Justices Holmes and Brandeis dissented, emphasizing the "non-infamous" character of the place of imprisonment and the lack of seriousness of the offense. But the majority of the Court expressed the view that hard labor made any offense infamous. On the other hand, the offense of intimidating a juror may be prosecuted without indictment where the statute does not impose hard labor or permit incarceration in a penitentiary.

The requirement of indictment does not apply at all to persons charged with offenses by the army or navy. It likewise does not apply to persons in the militia when these are in actual service in time of war or of other public danger. The qualifying provision of the amendment affects only the militia, not the regular army or navy.

What about persons in the service of the enemy? Since these are not expressly mentioned in the exception, it was argued in 1942 in the case of the Nazi spies and saboteurs that they could not be tried by a military commission without an indictment by a grand jury. The Supreme Court rejected this contention, pointing out that the Fifth Amendment was concerned with the prosecution of ordinary offenses, not with special cases arising out of war; that military tribunals for the trial of such cases without indictment had existed prior to the adoption of the Constitution; and that none of the Constitution's provisions was designed to alter the methods employed by such tribunals. Accordingly, the Supreme Court ruled that an indictment was not necessary in cases arising under the laws of war.

Double Jeopardy

PROTECTION against double jeopardy is one of the guaranties that had no specific connection with English history. It is of very ancient origin, having existed in the law of the European continent, the so-called civil law, which was derived from Roman law. It stems from the belief that when a matter has once been litigated the decision should be final. It is similar to the rule applicable to ordinary lawsuits and known to lawyers as *res adjudicata*. The guaranty is found in the Fifth Amendment:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

In a double sense this guaranty has no relation to state prosecutions. It does not prevent a state from punishing a person for an offense for which he has already been punished by the federal government, such as the illegal possession of liquor; it does not protect a person from being prosecuted a second time for a state offense in a state court. The first difficulty is often taken care of by state statutes which protect against such double prosecution; the second by state constitutional provisions similar to the federal one. However, Connecticut, Maryland, Massachusetts, North Carolina, and Vermont have no such guaranty in their Constitutions against double jeopardy. The question has arisen, in recent years, whether this is one of the rights inherent in due process and therefore protected by the Fourteenth Amendment against state infringement. This issue has not yet been settled. In the Palko case, in which the question was presented to the Supreme Court, the state had succeeded in having the dismissal of a prosecu-

tion set aside on appeal because the first judge had mistakenly decided a question of law in the defendant's favor. Then, when the defendant was tried the second time, he claimed that he had been twice placed in jeopardy. The Supreme Court held only that a second trial under such circumstances was not a denial of due process. Justice Cardozo said:

> The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before.

This guaranty achieves two main objectives. It prevents a second prosecution for a single offense after an acquittal; it prevents an increase of the punishment originally imposed after a conviction. Problems of interpretation have arisen in both instances. When is there a second prosecution? What constitutes a single offense? When may more than one form of penalty be inflicted?

We have already seen that the same act may constitute a double crime if committed in violation of the laws of two different sovereignties. But the same acts can also constitute two or more crimes forbidden by the law of a single sovereignty. The general rule is that the crimes are different unless the evidence required to sustain both is the same. That the offenses are related in character, that both charges grow out of the same transaction is immaterial. In consequence, where a single act, like arson or larceny, affects several pieces of prop-

erty or, like an assault resulting in death, violates more than one law, a person may be separately tried and convicted for each separate offense. In each situation the reviewing court must use its best judgment, on the one hand to protect the individual against harassment and persecution, on the other to prevent society from a too technical application of the rules. Judges have not always resolved this difficulty satisfactorily. They do not always agree among themselves.

Once punishment has been inflicted and in part carried out, it cannot later be increased. Suppose a judge has imposed a fine payable at some future date and then changes his mind. Can he impose a prison sentence instead? Or can he revoke a suspended sentence and then increase the term originally imposed? In the Roberts case, the majority of the Supreme Court avoided a consideration of the constitutional issue raised by the revocation of a suspended sentence and subsequent increase of the term of imprisonment originally imposed by deciding that Congress had not authorized such action on the part of a judge.

An interesting variation of the general problem reached the Supreme Court in 1943. For intimidation of a witness in a Labor Board proceeding, the Circuit Court sentenced the guilty person to six months' imprisonment and also imposed a fine. Three days after he was arrested the fine was paid. The Circuit Court, on the very same day, realized that it had made a mistake in imposing both a fine and a jail sentence since the law permitted punishment for contempt to be by way of fine *or* imprisonment. Thereupon the Circuit Court ordered the money returned and amended its sentence by leaving out the fine. The lawyer for the defendant refused to accept the return of the money and brought the case to the Supreme Court for review. Over the dissent of the Chief Justice, the Supreme Court ordered the man to be discharged from imprisonment on the ground that the payment of the fine had terminated the lower court's power to change the sentence. The dissent

was based on the fact that the prisoner had not really been deprived of the money he paid, since it was offered back to him on the very day when it was paid.

If Congress imposes both a criminal and a civil liability for the same wrong, neither acquittal nor conviction for the crime bars the civil remedy. This is true whether the civil remedy is a suit for an injunction to abate a nuisance, as under the prohibition laws, or an action to recover income tax penalties. This latter point was decided in the case of Mitchell, the former president of the National City Bank. He was sued for recovery of penalties after he had been acquitted of a charge of defrauding the government. An acquittal in a criminal case is not held a bar to a civil action based on the same acts, because of the greater degree of evidence required to convict a defendant in a criminal case. In the latter instance the jury must find him guilty beyond a reasonable doubt, while in a civil case a jury may find against a defendant if it believes that there is a greater weight of evidence in favor of the plaintiff.

Generally it is held that after one acquittal there can be no further prosecution, although many state courts have ruled otherwise when the indictment was wholly insufficient. However, a reversal of a conviction, as the result of an appeal taken by the accused person, does not bar a new trial. There has been considerable difference of opinion about the effect of the termination of a trial without any verdict having been rendered. A new prosecution is permitted when the prosecution requests a discontinuance or when a mistrial is ordered for a sufficient reason. It should be kept in mind, finally, that the "jeopardy" to which the Constitution refers does not begin until the trial has commenced with the swearing of a juror.

Self-Incrimination

THE notion that no one should be forced to testify against himself derives from complicated aspects of English history; in part from jealousy of ecclesiastical courts, in part from opposition to tyrannical practices. It reached its first formulation early in the seventeenth century when the Puritans opposed the methods used by the government in heresy prosecutions. One Lilburn, a vehement opponent of the Stuart kings, resisted attempts to require him to answer questions about books he was charged with having written. In 1641 he successfully procured the abolition of the practice of compelling suspected persons to give evidence. From this action of the Long Parliament the principle became established that a person was never to be forced to give incriminating testimony, even when brought to trial on formal charges. It may well be that the privilege was associated in the popular mind with the presumption of innocence so unique in Anglo-American jurisprudence, a principle, be it noted, that has not received any constitutional expression.

Yet from the days of Jeremy Bentham to the present time, no part of the Constitution has been so widely criticized as the section which prevents the one person who might know most about a crime from being forced to tell what he knows. This guaranty is contained in the Fifth Amendment:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, . . .

Like the guaranty against double jeopardy, that against self-incrimination has no relation to state prosecutions. For insistence by a state court that a person give incriminating testi-

mony will not be reviewed by the federal courts. Nor is the protection of the guaranty extended where the question objected to is put in a federal court but relates to a crime punishable only by a state. In like manner, a state court will not sustain a claim of privilege because of possible violation of federal law. In short, neither in state nor in federal courts does inquiry concerning a state crime violate the guaranty. Most states, however, have similar provisions in their own constitutions; Iowa and New Jersey alone do not.

While the guaranty, literally construed, would prevent a defendant from being forced to testify only in criminal prosecutions, such has not been its application. It has been interpreted to protect anyone, party or witness, in civil as well as criminal cases from answering a question which might result in his prosecution. It extends also to questions asked in proceedings before administrative bodies or legislative committees. But it applies only to natural persons, not to corporations. Moreover, it does not apply to a defendant in a criminal case who testifies voluntarily, except as to matters irrelevant to the case on trial. When a defendant in a criminal case refuses to testify, however, or properly claims the privilege, comment on his refusal to testify or answer is improper.

The privilege can be lost by waiver—that is, by not being claimed when the question to which the witness objects is asked—or by the witness' telling too much.

How much must be told by a witness before he loses the right to call a halt is by no means clear. Most American courts refuse to consider a claim of privilege which is not asserted until after the witness has told enough to "incriminate" himself. Generally the question arises in civil cases when a witness resists a cross-examination with regard to the details of some crime about which he has already testified along broad lines. Obviously, a witness who tells part of a story to help one side of a case should be required to tell it all. The courts have ruled accordingly that a witness must claim the privilege be-

fore he has told enough to incriminate; otherwise he loses the right to claim it.

This doctrine of waiver works well enough in civil cases where a witness ordinarily appears willingly, though he may actually have been under subpoena. A different situation exists in criminal proceedings, especially in grand jury proceedings. Here it is less likely that a witness, after telling part of a story to help one side, will balk at disclosing the rest. Suppose a person is called before a grand jury and there asked about his own conduct. He talks freely for a time, then suddenly realizes that he is being led along a road which will send him to jail, a confessed criminal. Can he stop at this point and claim the privilege? The question is especially important in the federal courts because of the rule that the privilege can be there asserted only in relation to some federal crime. Since many acts that are crimes against state law, such as receiving stolen goods, are federal crimes only if an additional element be present, such as transporting the goods across state lines, it often happens that in order to show that a crime against federal law is under consideration the witness must tell so much that it can be argued that he has already told all.

In such situations the courts should protect the witness, unless he has actually disclosed so much that he could be convicted on his testimony alone. A case involving that question was sidestepped by the United States Supreme Court in 1943. A witness had told of taking stolen money across state lines. He refused to reveal the name of the person from whom it had been stolen, for had he disclosed the identity of that person the prosecutor might have been able to secure him as a witness and thereby to obtain corroboration of the admissions made before the grand jury; without this corroboration the witness could not, under federal law, be convicted. The Circuit Court of Appeals for the Second Circuit upheld a punishment for contempt of court on the ground that the witness had waived the privilege against self-incrimination by disclos-

ing all the essential facts of the crime. Judge Frank dissented because these facts alone would not permit conviction. The Supreme Court dismissed the appeal as moot because the sentence had been served.

Often the only available evidence is from an accomplice who will hesitate to testify unless himself protected from prosecution. A particular individual can be pardoned in advance by the executive and so be compelled to testify. But such testimony is usually obtained by general legislation. Congress and the various state legislatures have provided in certain kinds of cases, as under antitrust laws, labor relations laws, prosecutions for racketeering, bribery, and the like, that any person who testified under compulsion of subpoena would be immune from prosecution by reason of his own admissions. Certain questions have arisen: whether the law was sufficiently broad to protect the witness and whether the witness had to claim the privilege at the time he was asked the questions to be free from the later prosecution.

Many years ago the United States Supreme Court ruled that a law did not sufficiently protect a witness which merely banned the use of his evidence, since it still might be possible to prosecute him on the basis of information obtained from the testimony he gave. While this decision has been criticized in many quarters, it has universally been followed. Therefore the privilege is available to the witness unless the law which grants immunity makes impossible any prosecution for the offense inquired into. But the immunity need extend only to the jurisdiction in which the proceedings are pending. If evidence has been received in a state court, though under a statute granting immunity, that immunity does not extend to federal prosecutions—and vice versa.

The question remains, can the witness lose the immunity by not asserting the privilege? If the immunity statute in express terms grants the immunity only to a witness who asserts it when being questioned, then failure to assert is a waiver and such a witness can be prosecuted notwithstanding his hav-

ing given testimony under subpoena. In many of the immunity statutes which Congress enacted after 1933 it inserted a requirement that the witness expressly claim the privilege. It did not, however, amend earlier immunity provisions such as those contained in the Sherman Anti-Trust law and the Interstate Commerce Commission law. Federal courts divided sharply on the effect of giving testimony under subpoena under these Congressional enactments which did not contain an express provision that the right to immunity must be claimed.

When the United States Supreme Court finally decided the question, early in 1943, it also divided. The majority held that the constitutional guaranty controlled and that the immunity statute would be a trap for a witness if so construed as to require an assertion of the privilege. Justice Frankfurter, with whom Justice Douglas agreed, believed that the decision of the majority resulted in a windfall to criminals, that the immunity could be waived by not asserting it in the same way that the privilege itself could be waived.

Some Questions of Policy

As Justice Cardozo said in the Palko case:

> Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

The famous lay reformer of the law, Jeremy Bentham, in his *Rationale of Judicial Evidence* published in 1827, savagely attacked the various justifications advanced in support of the privilege against self-incrimination and advocated its abolition. An eminent modern critic of the privilege, Dean Wigmore, thought Bentham had gone too far. Wigmore recognized the necessity of the privilege as it affects witnesses and

even prospective parties in preliminary inquiries. In such an inquiry the interest of society in obtaining testimony is more important than its interest in catching every possible criminal. As Wigmore noted, "the witness stand is today sufficiently a place of annoyance and dread." In inquisitorial proceedings such as grand jury proceedings the privilege is really needed as protection against harassment—that, indeed, was the historical occasion of its creation. Even after indictment Wigmore would not reject the privilege, though he believed it should be kept within narrow limits. His real objection to its elimination was that prosecutors would tend to rely on compulsory self-disclosure and the administration of justice would suffer morally. The same argument raises one of the greatest objections to the use of illegally seized evidence and wiretapping, as well. So long as the presumption of innocence remains a part of our legal system, evidence against an accused should come from sources other than the accused himself.

If it be urged that in Continental Europe justice has been done despite the absence of this and other guaranties, there are two answers. In the first place, much more judicial and administrative arrogance has been tolerated in these countries than is consonant with our ways and ideals. In the second place, an accused has certain protections under that system which are absent under ours. He may be compelled to testify, but he is permitted to become acquainted with the case of the prosecution. In our practice he is seldom allowed even to see the grand jury minutes.

The privilege against self-incrimination will no doubt remain part of our constitutional guaranties against administrative and judicial oppression. Although some criminals may go free in consequence, society nevertheless will benefit in the main by its knowledge that impure methods have not become an accepted part of the administration of justice.

Due Process

THAT there should be orderly legal procedure is of the essence of civilization. The barons of England recognized this in their struggle with King John which culminated in 1215 in the guaranties of the Magna Carta. There it was set down that the King would not despoil any freeman of his liberty except "by the law of the land." In the course of the centuries this guaranty was expanded to cover property in addition to life and liberty, and the "law of the land" became "due process of law." Like most of the guaranties which concerned liberty-loving Englishmen and the framers of the Bill of Rights, this one was chiefly directed against arbitrary action by officials. That it might be used to set aside acts of the legislature was certainly not within their expectation. And it was several generations after its adoption before American judges began to announce the doctrine with which we have become so familiar—that a law may be a denial of due process because it is "arbitrary."

This guaranty is found in both the Fifth and the Fourteenth Amendments:

> . . . nor [shall any person] be deprived of life, liberty, or property, without due process of law, . . .

> . . . *nor shall any State deprive any person of life, liberty, or* property, without due process of law, . . .

The provisions of the Fifth Amendment, like the other provisions of the Bill of Rights, are not binding on the state governments. But the Fourteenth Amendment changed the situation entirely. It is this part of the Constitution which has

resulted in federal scrutiny of state action in cases involving freedom of religion, speech, press, and assembly.

Expansion from Procedure to Substance

Due process of law originally meant decent procedure—simply the right to be heard, with reasonable notice of administrative proceedings or judicial action and a fair hearing assured. Shortly before the Civil War, however, judges in different parts of the country began expressing the idea that the due process clauses of their own state constitutions involved something more than this. They said that general laws might lack due process if they violated natural rights, and that such laws were arbitrary and void.

The United States Supreme Court was slow to accept this reasoning, although it had voided a state tax even before the adoption of the Fourteenth Amendment on the ground that a state had no right to legislate with regard to property outside its boundaries. In the Slaughterhouse cases, decided in 1873, the Supreme Court rejected the argument that a state regulatory law could be attacked under the then recently adopted due process clause of the Fourteenth Amendment. But lawyers for the owners of property were not discouraged. They returned to the attack, particularly in cases involving railroad rates. At first the Supreme Court ruled that legislative action in this field could not be judicially questioned—the only remedy was at the polls. Then it began to lay down the doctrine that to require a railroad to accept freight at rates that did not bring a fair return was confiscation and a denial of due process.

By 1900 the Court had become committed to the position that laws were void unless, in the eyes of the Court, they covered subjects which were a legitimate legislative concern. In determining what laws were void on this account, the judges often allowed their own social and economic prejudices

to control. To such an extent did this become so that Justice Holmes was moved to remark in 1905 that the Fourteenth Amendment had not embodied Herbert Spencer's *Social Statics*. For several decades his protest went largely unheeded while the Supreme Court slaughtered on the altar of due process numerous laws enacted for the protection of the underprivileged, adding to the liberty of the person expressed in the due process clauses a freedom of contract which often meant the freedom to starve.

Among the measures so struck down, often by a 5–4 decision, were laws condemning yellow dog contracts, limiting the hours of labor, establishing minimum wages, and laws regulating such businesses as employment agencies, ticket selling, and ice manufacturing.

The 1936 minimum-wage decision, the culmination of a series of illiberal pronouncements, resulted in the proposal made by President Roosevelt early in 1937 to overcome these decisions by an enlargement of the Court. Whether induced by this proposal or not, the Court changed its position. Justice Roberts shifted his vote in a second minimum-wage case and adhered to the liberal group in other cases. The conservative justices retired or died; the Court was completely made over. Thereafter the Court seldom voided a law declaring general policy on the ground that it lacked due process.

But the Court has not abandoned the principle underlying the earlier cases: that a law violates due process if its purpose or the method adopted to carry out even a lawful purpose appears to the judges to be contrary to the natural rights of businessmen or property owners. But the judges of today look on these matters in an enlightened spirit. It should be kept in mind, however, that it is this same basic principle which has brought forth many of the Court's civil liberties decisions of the last decade. In other words, the Court as now constituted is more concerned with the protection of personal rights than property rights. But this may not always be so.

Notice

The person to be proceeded against must be given notice of what is intended, for this is the very essence of due process. Whether the case involves a civil suit for damages, a tax claim, the condemnation of property, a divorce suit, a criminal prosecution, deportation proceedings, or any other form of government activity which might affect life, liberty, or property, this holds equally true.

No particular form of notice is required. Personal service of the commencement of a civil suit is not always essential; mailing of a notice may sometimes suffice. But if the defendant is not a resident of the state in which a suit for money damages is pending, only the personal form of service will give a default judgment value, except over property in the state where the suit was brought. On the other hand, where the suit relates to title to land or to marriage status, personal service may not be necessary.

Of course, in criminal cases there can be no judgments by default since a prosecution conducted in the absence of the defendant would be considered a denial of a fair trial.

It is not enough, however, that there be notice. The notice must give the person affected a reasonable time in which to act. Moreover, it is essential that the notice give an indication of what is involved. This need not, in the first instance, be detailed. Hence in the ordinary lawsuit the summons need give no particulars about the nature or size of the claim. But at some stage the details must be disclosed. In criminal cases this protection for the accused is especially provided in the Sixth Amendment, though actual practice is not always in the spirit of the amendment.

Ordinarily no difficulty arises from the necessity for disclosing the nature of the complaint. We would be shocked to learn that anyone was deprived of liberty or property without being told the reasons for such action. Yet this happened during the Civil War when the writ of habeas corpus was sus-

pended by President Lincoln and hundreds of persons were imprisoned without judicial sanction or review. During the Second World War, without any suspension of the writ of habeas corpus (except in Hawaii), similar incidents have occurred, though on a smaller scale. A considerable number of citizens—not to mention the tens of thousands of Americans of Japanese ancestry evacuated from the West Coast—were ordered away from areas in which the military considered their continued presence dangerous. True, they were given hearings before military boards. But these hearings were hardly consistent with the fundamental concepts of due process to which we have been accustomed. The officers in charge of the hearings generally refused to say why the particular citizen was believed to be dangerous, and he was never confronted with any witnesses. Such inadequate hearings are not consonant with constitutional requirements of due process and will no doubt be judicially condemned.

Fair Trials

The Supreme Court approaches the problem of reviewing criminal trials in different ways, depending on whether the prosecution was conducted in a state or a federal court. Over all federal prosecutions it exercises general supervision; over state convictions it has jurisdiction only if it finds that there was a denial of due process.

Thus the Supreme Court has reversed federal convictions because it disapproved of the conduct of the trial in some respect, such as improper selection of jurors or inflammatory summation by the prosecutor. An interesting instance of the latter kind arose in the Viereck case. George Sylvester Viereck, who had registered with the State Department as a German agent, was charged in 1942 with not having made a complete disclosure of his relationship to Germany. His conviction was reversed because the trial court had misconstrued the scope of the registration law. Chief Justice Stone took occasion in his opinion to criticize the summation of the prosecutor because,

in referring to the war and the sacrifices of the soldiers, he had told the jurors that the soldiers were relying on them for protection. Of this the Chief Justice said:

> At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection.

It was not until 1923 that the Supreme Court interfered with any state prosecution. In 1887 it had rejected the contention in the Chicago Haymarket bomb case that the jury was improperly chosen; in 1915 it had ruled against Leo Frank's claim that mob feeling ran so high as to prevent a fair trial. The first time the Supreme Court interfered with a state conviction was in 1923 in the case of Moore v. Dempsey, involving a group of Arkansas Negroes who were convicted of murder in a state court. They claimed that they had been rushed to trial under the influence of a mob which threatened to lynch them and that the trial had been a mere sham. A federal judge had refused to issue a writ of habeas corpus. This, said the Supreme Court, was erroneous. The federal judge should have granted a hearing to the convicted men, for if their claim was correct, the conviction could not stand.

Confessions

It has long been settled law that a confession obtained by force or torture may not be used. The Supreme Court in several cases has decided that the conviction may not stand if the chief testimony consisted of such a confession. In Ward v. Texas the defendant, an ignorant Negro house servant, was kept away from friends and lawyer, was held by the police in violation of a state law requiring immediate arraignment, and

was induced to testify after prolonged questioning. His conviction was set aside. Mr. Justice Byrnes said:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

During the same term the Court, over the dissent of Justices Black and Douglas, refused to interfere with a California conviction in which a confession was obtained under somewhat similar circumstances, because the Court noted that the defendant had shown self-possession and acumen throughout and believed that the confession resulted not from the improper conduct of the police but from the defendant's learning that a confederate had confessed.

On the other hand, in a federal case, a defendant claimed he had pleaded guilty as the result of coercion by agents of the F.B.I. The Supreme Court ruled that, however unlikely his story, it was the duty of the District Court to take evidence on the defendant's claim and pass on the facts.

The McNabb case illustrates the difference between state and federal prosecutions. Several members of a Tennessee mountain family were charged in a federal court with the murder of a federal officer who had broken up their illicit liquor business. Immediately upon their arrest they were taken to a detention room where they were kept incommunicado for several days, questioned by numerous officers over long periods of time, and induced to confess. The Supreme Court, Justice Reed alone dissenting, reversed the convictions on the ground that the officers had exceeded the powers conferred on them by Congress and had thus rendered inadmissible in evi-

dence the confessions obtained from the accused. Mr. Justice Frankfurter said it was unnecessary to consider any constitutional issue:

> For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

Perjured Testimony

Tom Mooney was convicted of murder in California. The United States Supreme Court refused to review the conviction. For years Mooney sought redress, claiming that the District Attorney had obtained this conviction by the use of testimony the District Attorney knew to be perjured. Finally he sought a writ of habeas corpus in the United States Supreme Court. That Court refused to issue the writ on the ground that Mooney had not exhausted his remedies in the state courts; however, the Court declared that if his claim was substantiated

the conviction could not stand. Accordingly, Mooney appealed to the state courts for relief. The California supreme court appointed a referee who held long hearings and decided against Mooney's contentions, giving the District Attorney a clean bill of health that to many seemed but a whitewash. His conclusions were accepted by the state supreme court, despite a strong dissent by one of its members, Judge Langdon. The United States Supreme Court refused to interfere either by direct review or by habeas corpus, with Justices Black and Reed dissenting. Subsequently Governor Olsen pardoned Mooney.

In a similar case the Supreme Court affirmed a state ruling that there was no substance to the convicted man's claim that any official knew the testimony of a confederate to be false or to have been obtained through coercion. Justices Black, Douglas, and Murphy disagreed on the ground that knowledge by the prosecution of the improper methods used in obtaining the confession was not essential. It is not altogether clear from the opinion of the majority in this case whether the Court would affirm a conviction manifestly based on testimony procured by the third degree or on perjured testimony, even if the prosecutor knew nothing about it. One of the Circuit Courts of Appeals has ruled, in a case involving perjured testimony, that the conviction must be reversed regardless of whether the prosecution knew the testimony was perjured.

These cases illustrate the unsatisfactory character of the relief available. A convicted person who claims to have been railroaded by evidence that was improperly procured by a state prosecutor is forced to have the truth or falsity of his claim passed on, in the first instance, by the courts of the state whose officials he is accusing—except on the rare occasions when those courts declare themselves powerless to grant any relief. It is hardly strange that in the few cases on record the state courts have accepted the version of the officials. The only reason for the federal courts' reluctance to decide the facts for themselves is a regard for state sovereignty. But it is more

important that justice be done than that state sovereignty prevail. The federal courts, not the state courts, should pass on all questions of fact which underlie basic constitutional rights.

Other State Cases

In a case where a state judge had a financial interest in the fines which he imposed, the Supreme Court reversed the conviction on the ground that such a judge could not meet the standard of impartiality essential to due process. However, when counsel for Sacco and Vanzetti made a belated effort, just before the execution of these two men in the summer of 1927, to obtain writs of habeas corpus from various federal judges, they failed. Neither Justice Holmes nor Justice Stone saw sufficient merit in the claim that Judge Thayer, who presided at the trial, by various statements made out of court had shown prejudice sufficient to vitiate the conviction. The case never reached the Supreme Court because the defendants were executed while it was in recess.

State convictions have also been reversed where evidence of an essential element of the crime was wholly lacking. This happened in Fiske v. Kansas because there was no evidence that the I.W.W. was an organization which advocated the violent overthrow of the government, and such had been the charge. It is also clear that the evidence, whatever it may include, must establish the crime stated in the indictment. To convict a person of an offense not urged against him would be "sheer denial of due process."

The Supreme Court will not review a state conviction merely because the judge's charge was wrong. When the third of the Scottsboro convictions was challenged on this score, the Supreme Court refused to interfere. However, it is probable that a conviction would be reversed if the judge's charge was so outrageous that the Court concluded the defendant was deprived of a fair trial.

The most remarkable state convicton reviewed by the Su-

preme Court was that of the gangster Lepke for plotting a murder. He and two of his gang were convicted entirely on the testimony of accomplices and of other self-confessed crooks and murderers. Their lawyers argued before the Court of Appeals of New York that a combination of incidents had prevented a fair trial. They complained of newspaper publicity having whipped up public opinion, of the refusal of a request for change of venue, of the selection of prejudiced jurors. They maintained that the prosecutor had withheld evidence which might have helped the defense, that in his summation he improperly asserted his own belief in the guilt of the accused and untruthfully promised that the accomplices who had testified for the prosecution would not be set free. Defense counsel accused the presiding judge of bias, which they said was made manifest in many rulings and comments during the trial and particularly in his charge; and they complained that he had taken the case away from the jury on an important issue. Three of the judges of the Court of Appeals accepted these contentions and concluded that the accused had had no fair opportunity to defend their lives; three other judges rejected the contentions. The tie was broken by the vote of the Chief Judge Lehman. While he agreed that serious errors had been committed at the trial, he felt that these had no influence on the verdict. Therefore, he voted to uphold the conviction. The case was then taken to the United States Supreme Court.

At first the Supreme Court refused to interfere. That decision was made, as is customary, on printed papers alone, without the lawyers' having had an opportunity to argue in open court. It was not accompanied by any statement of the Court's reasons. But the lawyers for the men sentenced to die persevered and pressed for a rehearing. The Court granted their request, heard extensive oral arguments, and at length unanimously affirmed the convictions. Justice Roberts concluded that there was no foundation to the claim that the jury had

been biased and that the other complaints were not of such a character as to justify a decision that the trial had been unfair.

Statutes That Deny Due Process

There are two general types of laws which have been judicially condemned: laws that are vague and laws that create unreasonable presumptions. Such measures may be either state or federal legislation. Finally, laws dealing with special subjects such as education and sterilization have been attacked as denying due process.

Analogous to the rights of opinion expressly stated in the First Amendment is the right to determine the education of one's children, a right nowhere mentioned in the Constitution, but read into the due process clause by the Supreme Court. The issue arose when the antagonism of the First World War, and the so-called Americanization program of the post-war period, produced a variety of laws prohibiting the teaching of foreign languages to young school children. The Court held all these laws unconstitutional. Mr. Justice Holmes dissented in line with his general philosophy that the decision of a legislature should not be disturbed if reasonable men might differ about the desirability of a law. For he could see that reasons might be advanced to support the view that young children should receive all their school instruction in English.

Mr. Justice Holmes joined the rest of the Court, however, in condemning an attempt made by Oregon to outlaw private schools altogether, agreeing that the state had no power to "standardize its children by forcing them to accept instruction from public teachers only." Justice McReynolds said in that case that the states had wide powers of regulation over schools and could require teachers to be of "patriotic disposition."

The United States Supreme Court has twice been concerned with state laws providing for sterilization of the criminal or

the insane. In 1927 the Court upheld such a law which dealt only with imbeciles because the law set up machinery by which any imbecile could show that he did not come within the definition of the law. In 1942 the Court set aside an Oklahoma law which provided for the sterilization of criminals because it violated the equal protection clause of the Fourteenth Amendment. Chief Justice Stone and Justice Jackson agreed that this Oklahoma law was unconstitutional, but based their conclusion on due process grounds because it lacked machinery whereby the convict could obtain a hearing on the appropriateness of sterilization in his particular case. The Chief Justice said:

> Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. Whether the procedure by which a statute carries its mandate into execution satisfies due process is a matter of judicial cognizance. A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.

The general rule is that a criminal statute must be sufficiently definite so that the average person can tell when he is violating it. Of course it is not really as simple as that. Many a law has been held valid although the judges differed in their understanding of its meaning and the final interpretation was by a 5–4 vote. It is only when the law omits all standard of guilt that it will be adjudged void. This was held to be true of the Lever Act, passed during the First World War in an en-

deavor to halt profiteering. Congress provided for criminal prosecution of anyone who charged more than a reasonable price, but set up neither a norm by which the reasonableness of the price might be determined nor machinery for fixing prices. The Supreme Court declared the law too vague to be enforcible.

Recently a lower federal court held unenforcible a law which barred Communists from employment in W.P.A. on the ground that there was no definition of what was intended to be included within that very broad term of opprobrium. The Supreme Court voided a New Jersey statute that punished a person for being a "gangster." In the Angelo Herndon case Justice Roberts pointed out that Georgia's law against insurrection was, as defined by the state courts, so vague as to be a "dragnet which may enmesh anyone who agitates for a change of government."

On the other hand, laws have been upheld which, like the Home Owners Loan Act, prohibited all but "ordinary" charges for title examination and the like. And criminal syndicalism laws that punish "sabotage" have been held constitutional, despite an objection to the vagueness of the term, where the word was defined as the wilful or malicious injury to property. Anti-trust laws which speak of "restraint of trade" have passed the challenge, though litigation in this field has shown much uncertainty about the meaning of that phrase.

Because of the impossibility of compelling defendants in criminal cases to testify if they do not want to, Congress and the various state legislatures have adopted a device which, in effect, forces them to testify. They have passed laws which provide that certain easily proved facts create a presumption of the existence of other facts necessary for conviction. For instance, a machine gun is found in a certain house. That is easy to prove. Yet without the testimony of the occupant or owner of the house it may not be possible to establish who is responsible for its being there. Therefore a presumption is

created by law that the owner or occupant was in possession of the machine gun. Then, unless he testifies and satisfies the jury that it came there without any act of his, he will be convicted. Does such a statutory presumption conflict with the Constitution?

While there is as yet no conclusive answer to the precise case we have put, the Supreme Court has laid down certain general principles. A presumption is valid if there is a rational connection between the fact established and the conclusion to be presumed. In such a case it is proper to call on the defendant to explain, for he has the opportunity of explanation at hand. However, if there is no such rational connection, then it really is not possible for the defendant to explain and the presumption is void as a denial of due process since it makes legislative fiat take the place of evidence. For instance, a statute was struck down which punished as fraud a person's failure to work for an employer for the period agreed upon after an advance payment had been made, because the law permitted the jury to presume the fraud merely from the subsequent failure to complete the work.

The Supreme Court has also held void an Act of Congress which punished the interstate transportation of firearms under certain conditions and made the presumption that firearms in the possession of a person previously convicted of a crime of violence had been transported across state lines.

Miscellaneous Matters

While an appeal in criminal cases is generally allowed as the defendant's right by federal and state laws, there is no constitutional guaranty of that right in the Constitution of the United States nor in those of many of the states. The Supreme Court of the United States has often pointed out that the right to appeal is not essential to due process. Nevertheless, when appeal is not available either because of lapse of time or for other reasons, the state must provide a method for the judicial review of constitutional issues. Failing it, the fed-

eral courts will interpose by writ of habeas corpus. However, state courts need not entertain an application for such a writ when the constitutional question could have been raised by appeal but was not.

Although the courts have uniformly ruled that deportation is not punishment and the proceedings are not criminal in character, an alien subject to deportation is entitled to all the elements of a fair trial recognized in criminal cases except that he is not entitled to trial by jury.

Trial by Jury and Place of Trial

NOTHING is more characteristic of Anglo-American jurisprudence than the jury system. Trial by a jury of one's "peers" was guaranteed by the Magna Carta. That provision was intended to assure to nobles the right to be judged only by nobles, but it was a guaranty that proved valuable to ordinary people as well. In the course of history two elements of the jury became fixed—that it be a jury of twelve, and that it be selected from the neighborhood where the trial was held. The right to a jury trial applied to both civil and criminal cases, though not to all of them. In eighteenth-century England and in the colonies, cases of small importance, both civil and criminal, were tried without a jury. Civil cases of great importance might also be heard without a jury if they were on the "equity" side of the court—cases involving injunctions, accounts, and the like. Likewise it was well established that military tribunals might function without any jury.

There are three provisions dealing with jury trials:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.—Article III, Section 2, clause 3.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . —Sixth Amendment.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.—Seventh Amendment.

Except as restricted by their own constitutions, the states are free to abolish jury trial altogether. That was decided many years ago in relation to jury trial in civil litigation, and the Supreme Court has frequently expressed the view that the jury provisions of the federal Constitution do not affect the states at all. It has, moreover, refused to hold that trial by jury is an essential part of due process even in criminal cases. Consequently this guaranty has not been siphoned into the Fourteenth Amendment.

These provisions do not apply to military tribunals. Nor do they necessarily apply to the insular possessions, such as Puerto Rico. In these fields Congress has power to legislate as it thinks best. On the other hand, the jury provisions do apply to aliens as well as to citizens.

The right to a jury trial applies only to strictly criminal trials, not to proceedings to punish for contempt or to deportation cases. However, Congress can provide for trial of minor offenses without a jury. There has been some uncertainty concerning the character of offenses which can be tried without a jury. In the Clawans case the majority of the Supreme Court held that a jury might be dispensed with where the charge was that of selling merchandise without a license, even though the punishment might be a fine as high as $300. Justices McReynolds and Butler thought it was incongruous that in civil cases there must be a jury if more than $20 was involved, while in criminal cases there need not be one though a substantial fine might be imposed. The majority of the Court recognized that the amount of the fine or the extent of the possible jail sentence might be determining factors as well as the nature of

the offense, but no limits were then indicated by the Court for the guidance of Congress.

It is clear that a serious offense must be tried before a jury. The Supreme Court has ruled that a conspiracy arising out of a labor dispute was such a serious offense, and that even the offense of driving an automobile recklessly could not be tried without a jury.

How Is the Jury to Be Selected?

The Sixth Amendment is precise in its requirement that the jury be "impartial." In other words, the jury must be chosen in such a manner that it represents a "cross section of the community." In the Glasser case it had been charged that the women on the panel had been taken from a list furnished by a particular organization. Such a method of selection was unanimously condemned. But the convictions were nevertheless affirmed because defendants had made no attempt to prove their charges.

Discrimination in the choice of jurors is improper in the federal courts, despite the fact that the equal protection clause does not restrict the federal government. But the exclusion of persons from juries because of race or religion would violate the Sixth Amendment's command that there be an impartial jury. No such result follows, however, if women are entirely excluded from jury service, because Congress has broad powers of classification and could advance many reasons in support of the exemption of all women from jury duty. No case has yet reached the Supreme Court which involved the contention that a jury was improperly selected because working men were excluded from the rolls, although a lower federal court has indicated that this would be improper. Still, no one has the right to demand a jury composed, even in part, of persons of his own race, sex, or class. It is only the exclusion of persons on racial or similar grounds that can be objected to. Such exclusion alone denies "equal protection."

In many federal districts jurors are selected by clerks who consult various sources such as telephone directories, club lists, chamber of commerce and civic organization rosters. Complaint has been made that jurors so selected represent the more conservative elements in the community, that labor union members are seldom included, and that no true cross section of the community is obtained as the result of such methods of selection. The method has been defended on the ground that it produces jurors of a high degree of intelligence.

On this subject the words of Justice Murphy in the Glasser case should always be kept in mind. He said:

> . . . the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

Another troublesome question arising out of the selection of the jury relates not to the composition of the lists but to the bias of the particular individuals chosen. It frequently happens that a person called into the jury box admits that he is prejudiced against the defendant or that he has some opinion on the merits of the case, but when pressed by the judge states that he will decide the case according to the evidence

and will not let his prejudice or preformed opinion influence him. If the trial judge then lets this person serve as a juror, the appellate courts generally will not interfere. That is one of those matters over which the trial judge has "discretion." Before a higher court will reverse the conviction, it must find that such discretion has been abused. This it practically never does.

The Supreme Court has, however, reversed a conviction in a federal court where the trial judge interfered with efforts made by defense counsels to show that the talesmen were prejudiced against Negroes. An unsuccessful attempt was made in another case to obtain a ruling that government employees were necessarily disqualified in a criminal case prosecuted by the government.

Waiver

Trial by jury, like most of the rights guaranteed by the Constitution, can be waived. And it often is waived. In the McCann case the Circuit Court of Appeals in New York held that a person who had no lawyer could not constitutionally waive trial by jury when accused of a serious crime. The Supreme Court, however, rejected the view of the Circuit Court. Justice Frankfurter, for the majority of the Supreme Court, said that as an accused could plead guilty, even without benefit of counsel, so he could elect to be tried by a judge without a jury. He said:

> What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in States deemed otherwise enlightened, merely because in their courts the vast

> majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Justices Douglas, Black, and Murphy dissented, the latter in a separate opinion. The main dissent was motivated by the belief of the dissenters that it was impossible for a layman to make an intelligent decision in a mail fraud prosecution because so few defenses were available. Moreover, the dissenters concluded that in this particular case the trial court had made no real inquiry to determine whether McCann really understood the consequences of his decision to waive a jury trial. They believed that there were differences between pleading guilty and waiving a jury trial, and they rejected the notion that a defendant had a "right" to be tried by a judge alone. Justice Douglas believed this conception was "reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields." (That remark was a reference to the now discarded notion that minimum wage laws, for instance, denied freedom to workers.) Mr. Justice Murphy dissented further on the ground that jury trial could not be waived at all.

Place of Trial

The Constitution requires that the trial be held in the district and state where the crime was committed. This clause does not mean that the trial must be held where the defendant lives. A person can be removed from the place of his residence to a distant part of the country if an indictment be found there. While the Constitution contains no safeguards against improper removal, Congress has provided some measure of protection. Under the law as it now stands, there can be no removal if the accused person is able to show that there was no basis in fact for the indictment. The law does not, however,

permit removal to be resisted merely because the indictment is defective or even because the law under which it was found is unconstitutional. Nor can removal be resisted where there is a conflict of evidence as to the factual basis of the indictment.

Removal problems arise most often when the charge is conspiracy. As this crime may be committed in legal contemplation either where the conspiracy was entered into or where any part of it was performed, the prosecution has a wide latitude in choosing the place of trial. Often conspiracy indictments are used just for the purpose of bringing the accused to trial at a place the prosecution considers convenient. Sometimes injustice results from this practice because the distant jury may be prejudiced against a particular defendant or because the accused person may find it difficult to defend himself when taken far away from his home.

It is unusual for a defendant successfully to resist removal. Nevertheless removal was successfully resisted under an indictment found in Illinois which charged that a conspiracy had been entered into in Chicago to hold certain Negroes in peonage in Georgia, where the defendants lived; here the judge believed the claim of the accused that no conspiracy existed and certainly none was entered into in Illinois. But when the judge does not accept the version offered by the accused, the latter has no right of appeal from such a ruling and must submit to removal to the place of trial. For any hardship which follows because of this practice there can be no relief from the courts but only from Congress.

Civil Juries

The Seventh Amendment applies only to federal courts and is limited to cases which at "common law" were tried by a jury. It does not prohibit a judge from expressing his opinion on the facts so long as he leaves the final decision to the jury. It does not forbid the direction of a verdict when the evidence for one party is so slight that a jury's verdict in that

party's favor would be wholly unjustified. The amendment does not prevent a judge from ordering a new trial on the ground that the jury's verdict was excessive, but permitting the successful plaintiff to avoid the new trial by consenting to accept a reduced amount. But it does prevent a judge from granting a new trial because he thinks the verdict is not large enough and permitting the defendant to avoid the new trial by accepting the increase. For in the latter case the judge has made a finding beyond that which was made by the jury and has deprived the plaintiff of the right to have the jury make its own finding.

The Right to Defend

THE right to defend is inherent in every civilized code of law. But this privilege did not always include either the right to have a lawyer or the right to testify on one's own behalf. In England, until comparatively recent times, a party to a lawsuit was considered so interested in the outcome as to be disqualified to act as a witness. Moreover, lawyers were not allowed to persons charged with serious crime in the English courts until 1836. This denial of counsel had been denounced by English statesmen and lawyers as early as 1758, and it was entirely rejected in the colonies. Various state constitutions adopted during and immediately after the Revolution established the right of anyone accused of crime to be represented by a lawyer. When the federal Bill of Rights was adopted, it followed the American rather than the English practice:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.—Sixth Amendment.

Right to Counsel in the States

The Supreme Court has decided that the right of representation by counsel is inherent in due process in certain situations, and is then guaranteed against state interference, although the provision of the Sixth Amendment itself has no direct application to the states.

This was first decided in 1932, in the first Scottsboro decision. In consequence there were many who believed that the

Supreme Court had read the provision guaranteeing counsel completely into the due process clause of the Fourteenth Amendment. In the Scottsboro case convictions of rape in the courts of Alabama were set aside because the defendants had been denied a fair representation by counsel. They actually had been assigned lawyers, but under circumstances which made that assignment wholly futile. For the majority of the Court, Mr. Justice Sutherland said:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

And in 1942 the Supreme Court made the distinction plain. In the Betts case the accused, who was indicted for robbery and had no funds for a lawyer, asked the judge to appoint one for him. He was told that it was not the practice to do this in the county of Maryland where the case was tried, except in cases of murder or rape. The majority of the Supreme Court decided that no unfairness had resulted to the defendant from the refusal to give him a lawyer and that the Scottsboro case should be limited to the circumstances which there existed. Justice Roberts concluded that the problem involved in the Betts case was of such a character that the defendant could handle it himself without a lawyer. He commented on the fact that, when the Bill of Rights was adopted, not all the original thirteen states had provisions in their own constitutions guaranteeing the right to counsel and that even in 1942 not all of the forty-eight states had such a provision. He said:

> Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against

state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provision of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Justices Black, Douglas, and Murphy dissented. They pointed to the serious character of the crime and believed that it was impossible after the trial had been held to determine whether a lawyer's help might have made a difference. Mr. Justice Black said:

> A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.

Unless the Supreme Court changes its mind, it is plain that state convictions will not be reversed because of the refusal of the state courts to appoint lawyers for indigent defendants, except where other circumstances of the case indicate that the trial was an unfair one. It is probable, however, that any attempt on the part of a state to prevent an accused person from having a lawyer of his own choosing would be treated differently. The result may be one law for the rich and another for the poor, but it would not be the first time that this has happened.

Right to Counsel in Federal Cases

In the federal courts the command of the Constitution is absolute. No conviction will stand when the defendant has been refused a lawyer. So essential is this right that denial of counsel will wholly vitiate a conviction and permit a review by habeas corpus. That was decided in 1938 in Johnson v. Zerbst. The indigent defendants claimed that they had asked for lawyers both before and after trial and that they had lost their right to appeal because they had been kept in prison incommunicado beyond the time within which they could have filed an appeal. Mr. Justice Black said that, except when the right to counsel had been waived, the Sixth Amendment "stands as a jurisdictional bar to a valid conviction." The case was sent back to the District Court to determine whether or not there had been a waiver of counsel.

More recently the Court reversed the conviction of one of a group of defendants in a federal court because the lawyer who represented that defendant was, over his objection, assigned to represent one of the other defendants whose situation in the case was hostile to that of the lawyer's original client. In such a situation, said the majority of the Court, it was impossible for the trial to be a fair one.

The Supreme Court expressly decided, in the Johnson case, not only that the right to counsel could be waived, but that the burden was on the defendant to show that he had not waived it. Since that decision there have been many cases involving the question. The Supreme Court has made it clear that the lower courts must decide these cases only after hearing the evidence. They cannot reject a claim that counsel has been denied merely because the claim seems a preposterous one or because the defendant was probably guilty or appeared to have had a fair trial. If he claims he was denied the right to counsel, there must be a hearing where the witnesses can be examined and cross-examined to determine whether the defendant did waive it.

Knowledge of the Nature of the Offense

In order that a person may properly defend himself, he must know of what he is accused. The Sixth Amendment contains this express requirement, yet it has been followed less frequently than the other commands of the Constitution. For most indictments are scanty indeed, stating little more than the language of the law which defines the crime. This is a particularly unfortunate practice because the prosecutor is not even restricted by the dates and places specified in the indictment. He may prove any act of the nature characterized by the indictment if it was committed within the jurisdiction of the court and within the time fixed by the statute of limitations. A defendant can pin the prosecution down, to be sure, by a bill of particulars. The difficulty is that he does not always get such a bill of particulars, and the higher courts are reluctant to reverse convictions when bills of particulars have been refused. It would seem that some accommodation between the right of the defendant to know what he is actually charged with and the right of the prosecution to keep back its evidence until the trial, should be worked out by Congress if the courts have been unable to do so.

Confrontation with Witnesses

The Sixth Amendment also guarantees that a defendant shall be confronted with his accusers so that he may have an opportunity to cross-examine them and question their credibility in various ways. This right is clearly essential under our concept of the administration of justice. A few cases have arisen interpreting this provision, although direct violations of its command fortunately have not occurred. For instance, testimony can be received though the witness is not present in court, when he testified at a former trial and later died, or when the statement which is offered in evidence was made at the point of death.

On the other hand, the Supreme Court has condemned an

attempt by Congress to permit the use of evidence taken at an earlier trial with which the later defendant was not connected. Thus a statute was declared void which, in a prosecution for the receipt of stolen goods, permitted the fact that the goods were stolen to be established by the conviction of the thief.

Bail and Punishment

WHEN bail and punishment were under consideration, English history again afforded a source for the framers of the Bill of Rights, this time indeed an exact model. For the Declaration of Rights adopted in 1689 contains the identical language later transported here in the Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This amendment has no direct application to the states, nor has it yet been applied to state proceedings through the due process clause of the Fourteenth Amendment. There are numerous statements of the Supreme Court which indicate that a punishment might be considered excessive in relation to the crime involved, so that it would be a denial of due process. Almost all states, however, have provisions in their own constitutions similar to the Eighth Amendment.

The right to bail in cases not punishable by death is generally conceded. But the amount of bail is often fixed so high that the accused person is unable to raise it and must stay in jail. If the prisoner thinks that the bail is too high, he can seek relief by habeas corpus. Then the reviewing judge will determine whether, under all the circumstances of the case, the amount of bail originally fixed is too high. The judge will take into consideration the ability of the prisoner to raise the required amount, the nature of the crime, and the probability that the prisoner will appear for trial if released on bail. In some states the courts have ruled that the legislature could authorize the withholding of all bail, even in cases not involving punishment by death. The higher courts have made it dif-

ficult for prisoners to get bail by refusing to interfere with the original denial of bail or with the setting of very high bail, on the ground that this was an act of judicial discretion. Only in extreme cases is relief possible in states which adhere to this rule.

It is difficult to determine whether the provision of the Eighth Amendment against cruel and unusual punishments has any present meaning. It has often been said that a punishment is cruel if it involves torture or lingering death, but no such case has actually arisen. Punishment by death, whatever the means employed, has not been considered cruel or unusual.

The only time that the United States Supreme Court set a punishment aside as cruel and unusual was in the Weems case which arose in the Philippine Islands. The Philippine Bill of Rights contains a provision similar to that of the Eighth Amendment. Nevertheles, its Penal Code provided that certain offenses should be punished at hard labor, accompanied by the carrying of a chain hung from the wrist to the ankle and by the loss of numerous rights after the expiration of the prison sentence. The decision of the Supreme Court rested in part on the fact that only certain offenses were so punished and other offenses of greater enormity were not. Justices White and Holmes dissented.

The state courts have more frequently set aside punishments inflicted by their courts. In North Carolina, for example, a five-year jail sentence for assault was considered excessive. In New York a lower court likewise decided that imprisonment for non-payment of alimony that had run to two years and seven months was cruel and unusual punishment.

Bills of Attainder and Ex Post Facto Laws

THE history of England had shown the American colonists that in times of political excitement, particularly when rebellion was in the air, the desire to punish created impatience with the ordinary forms of law. Recourse was often had to Parliament instead of the courts to obtain a declaration that a particular individual or a group of persons was guilty of treason and should be punished by death. Such an edict was known as a bill of attainder.

Instances of bills of attainder occurred in the reign of Henry VIII when the Earl of Kildare was found guilty of treason by legislative edict, in the reign of Charles I when the Earl of Strafford was thus executed, and under Charles II when Clarendon was banished under pain of conviction for treason.

Even when the legislature passed laws which punished wrongful acts rather than specified persons, the substance of justice was frequently denied because of laws that made acts or words criminal that had not been so when performed or uttered, or greatly increased the punishment which might be inflicted for acts or words previously punishable only to a mild degree. Such laws were known as ex post facto laws. Instances of ex post facto laws were numerous in eighteenth-century England. Their potency as instruments of tyranny continues, for they were used freely in Nazi Germany as formulas for getting rid of victims in a "legal" way. One famous instance occurred when the burning of the Reichstag in 1933 was made high treason after the event. To guard against such legislative abuses, the framers of the Constitution formulated prohibitions which were directed against the federal government and the states alike:

. . . No bill of attainder or *ex post facto* law shall be passed.—Article I, Section 9.

No State shall . . . pass any bill of attainder, *ex post facto* law, . . . —Article I, Section 10.

There have been no instances of classic bills of attainder in our history. But after the Civil War Congress and some states sought to disqualify former Confederates from practicing certain professions. In the Constitution adopted by Missouri, to cite one instance, an oath of loyalty was exacted of all lawyers and clergymen. This oath included a statement that the person taking it had not participated in the rebellion or aided those who had. Refusal to take the oath resulted in disqualification from practice of the profession. Congress exacted a similar oath with regard to the practice by attorneys in federal courts. Both laws were challenged as bills of attainder and ex post facto laws and, on both counts, held void by the United States Supreme Court, although four of the judges dissented.

The opinion of the majority in each case was by Justice Field. He concluded that the disabilities created were penalties for acts performed in the past which had no relation to the professional qualifications of those affected and that such legislative punishment was, in effect, a bill of attainder, though the punishment was less than death and did not involve loss of liberty, and though the form used was indirect through exaction of an oath.

The dissenting judges, led by Justice Miller, were unable to see how such an oath could be construed as a bill of attainder; it was directed at no individual or group since all were required to take it; it imposed no punishment. However distasteful oaths of this character may seem, it is difficult to escape the logic of the dissenting judges in these cases.

The majority also ruled that the deprivation of the right to practice a profession constituted punishment and violated the constitutional prohibition against ex post facto laws, since the penalty was concededly imposed for acts which had oc-

curred before the law was passed. But the minority insisted that the prohibition of the Constitution applied only to criminal prosecutions, that the Court had repeatedly so ruled, that here was no such case. Once again the minority seems to have expressed the more logical view.

There have been many other cases involving ex post facto laws, but the only application of the doctrine of these two cases came in another case growing out of the Civil War, where West Virginia had imposed a similar loyalty oath on litigants. This time only one judge dissented from the decision holding the law void. Later on, these decisions were taken to be limited to situations where the conditions of disqualification had no relation to the functions of the professions involved. Thus the Supreme Court has upheld a law which disqualified physicians because of conviction for crime, even when the particular conviction relied on had occurred before the law was enacted. It is probable also that, if now confronted with laws like those which exacted the post-Civil War loyalty oaths, the Supreme Court would condemn them under the due process clause rather than under the clause prohibiting bills of attainder or ex post facto laws. In the legal language of today, which had not yet been developed at the close of the Civil War, the Court would rule that to disqualify a person from practicing a profession on account of past acts having no reasonable relation to his professional duties was "arbitrary."

Except for these post-Civil War situations, the Supreme Court has limited the prohibition of ex post facto laws to criminal cases. It has ruled repeatedly that the prohibition has no application to deportation proceedings, with the result that a person can be deported for having done something which, at the time it was done, was not ground for deportation. It is by virtue of that doctrine that the second deportation proceeding against Harry Bridges became possible. After the Supreme Court had ruled in 1939 that the law then in existence did not permit deportation for past membership in an organization which advocated violent revolution and Bridges

had been exonerated from the charge of present membership in such an organization, Congress passed a law to the effect that persons could be deported for membership in the past. A second proceeding against Bridges resulted in a deportation order sustained by the District Court.

In ordinary criminal cases the scope of the prohibition against ex post facto laws has been reasonably well defined. The Constitution prohibits punishment for an act not illegal when committed and prohibits the increase of punishment for acts already illegal. It does not, however, prohibit changes in procedure such as the qualifications for witnesses, rules of evidence (except as to the quantity required to convict), rights of appeal, or methods of carrying out punishment.

CHAPTER XIX

Slavery Abolished

ONCE President Lincoln had abolished slavery as a war measure, it became evident that a successful North would not permit its reintroduction. Even before the Civil War had been won, a constitutional amendment was proposed in the very words of the ordinance of 1787, which had declared that the Northwest Territory should be the abode of free men only. It was ratified December 18, 1865, and became the Thirteenth Amendment:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Of all the provisions of the Constitution, this alone is all embracing. It binds the federal government, the states, and all persons within the confines of the country. In no uncertain terms it announces that slavery in all its forms should be abolished. While prompted by concern for the Negro, this amendment is yet so broad that it covers all persons. There has never been any direct attempt on the part of any state legislature or of Congress to flout its terms. Congress has made it a criminal offense to practice peonage. And the Supreme Court has held such legislation to be within the power of Congress under the Thirteenth Amendment.

Those people still interested in procuring forced labor for their plantations have adopted various devices. One of these consists of paying fines imposed by the courts on petty offenders, and then obtaining agreements from the offenders that they will work for a fixed period. Congress has declared such

agreements to be in violation of the amendment and the Supreme Court has sustained criminal prosecutions based on attempts to enforce such contracts.

Another device adopted by states favoring employers of cheap labor is to pass a law punishing a person who fraudulently obtains money as an advance payment for work. By itself such a state law is perfectly good. Since it is almost impossible, however, in such cases to establish fraud, the state laws go further and declare that the fraud will be presumed from the failure to complete the work. The Supreme Court has repeatedly struck down such laws on the ground that there is no rational relation between the failure to work and the charge of fraud. Nevertheless, peonage continues to exist in portions of the South despite the successful prosecution of persons engaged in this practice.

Sometimes economic conditions create a state of forced labor. Many states have laws which forbid the "enticement" of workers, thus making it difficult for many to improve their conditions. This situation obtains chiefly in the Southern states where there has been a large supply of cheap Negro labor often sought after by employers in neighboring states. Many Southern states make it difficult for their inhabitants to find jobs elsewhere by requiring the payment of very large license fees by employment agencies acting on behalf of out-of-state employers. These laws have been unsuccessfully attacked on various constitutional grounds.

Sometimes force is used to prevent the migration of workers, even within the boundaries of the same state. In 1937 some Georgia planters forcibly prevented their cotton pickers from leaving one county for another because the local crop had to be picked as quickly as possible in the face of rapidly declining prices, the result of a large crop and bad business conditions.

Despite the broad language of the Thirteenth Amendment, the Supreme Court in 1897 upheld an Act of Congress which punished seamen who broke their shipping articles. The de-

cision rested on historical grounds: sailors had always been treated differently from ordinary employees; conditions on board a ship justified this difference. Later, however, Congress removed this anachronism from the law.

There are other conditions under which the state may obtain forced labor from its citizens and punish them if they fail to perform it. Road building, jury duty, militia service are among the duties which the state may exact. In addition, convicts may be compelled to perform labor while in confinement, such labor being expressly excepted from the scope of the amendment.

During wartime, workers have been prevented from freely moving from job to job. No constitutional test of these restrictions has been attempted; in all probability, no such test would succeed. Compulsory service by civilians in time of war has never been attempted in the United States, though several times proposed during the Second World War. There would seem to be little ground for constitutional attack on such service if performed for the state; questions would probably rise only if private employers received some benefit from the forced labor.

Privileges and Immunities

THE creation of a federal government impelled the framers of the Constitution to adopt an entire article, the Fourth, dealing with relations between the states. The first section, known as the "Full Faith and Credit" clause, dealt with public acts and judicial proceedings. The second clause, with which we are more directly concerned here, was intended to prevent discrimination by one state against the citizens of another. During the Civil War the concept of national, as distinguished from state, citizenship came into vogue; this concept was shortly embodied in the first part of the Fourteenth Amendment. It is important to bear in mind that the original Constitution dealt with privileges which derived from state citizenship; the amendment deals with privileges derived from national citizenship. The texts follow:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.—Article IV, Section 2, clause 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . —Fourteenth Amendment, Section 1.

The original Constitution contained no definition of national citizenship although it gave Congress power to lay down the terms on which foreigners might be naturalized. Before the Civil War the Dred Scott case held that slaves were not citizens protected by the original Constitution. That there might be no doubt of the status of the newly freed Negro, the Fourteenth Amendment defined national citizenship. It provided the conditions under which such citizenship might be

acquired: by birth in the United States, or by naturalization.

The courts have interpreted this provision literally. Consequently, anyone born here is a citizen although, because of his race, he might not be eligible for citizenship by naturalization. The declaration by Congress that Asiatics might not become citizens thus affects naturalization alone. An attempt made in 1942 to have persons born in the United States of Japanese ancestry declared ineligible to citizenship was summarily rejected by the Circuit Court of Appeals in San Francisco.

How Citizenship Can Be Lost

The Constitution contains no provisions with regard to loss of citizenship. But Congress has specified various actions which may result in loss of citizenship by a naturalized citizen, and even in certain instances by a native-born citizen—as by marriage to an alien. Among these acts are the taking of an oath of allegiance to a foreign country.

Moreover, an alien who has obtained naturalization illegally or by fraud can be deprived of his citizenship by legal proceedings. Many such cases have been brought against naturalized Germans during the Second World War on the ground that they had remained Nazis at heart. Generally the proof of fraud in these cases consisted of membership in the German-American Bund and statements made long after naturalization. It is important in cases like these to distinguish between those persons who became naturalized without intending to renounce allegiance to Nazi Germany, and those persons who in good faith did intend to renounce their former allegiance although they became adherents to the Nazi ideas after naturalization. There can be no doubt that Germans in the first group should lose their citizenship and that no proceedings should properly be instituted against Germans in the other group. But judges must use great care in deciding these cases lest their dislike of the unpopular Nazi ideas lead them to a cancellation of citizenship because of those ideas rather than because of any fraud.

Under the same general provision of law proceedings were also instituted against Communists. The case of William Schneiderman is the most notable. The government contended that Schneiderman had committed fraud in not disclosing the fact of his membership in the Communist Party and that such membership was inconsistent with his oath of allegiance to the United States because that Party advocated the overthrow of the government by force. Schneiderman denied that the Party advocated violent revolution, insisted that he himself did not believe in the use of force, and pointed out that he had been asked nothing about his membership in the Communist Party when he applied for naturalizations.

The Supreme Court, by vote of 5–3, held that it was improper to set aside Schneiderman's naturalization. Justice Murphy, for the majority, said that in the absence of proof that Schneiderman himself had advocated illegal doctrines his citizenship could not be canceled merely by proof that the Communist Party advocated such doctrines, especially as the evidence on that subject was in conflict. Chief Justice Stone, with whom Justices Roberts and Frankfurter agreed, dissented on the ground that the evidence justified the conclusion that, at the time Schneiderman applied for citizenship, the Communist Party advocated forcible revolution and that Schneiderman's own activities on behalf of the Party could not be ignored. The Chief Justice believed that support of the dictatorship of the proletariat by the Communist Party precluded attachment to the principles of our Constitution, which rejects government by dictatorship.

Whether citizenship can also be lost on grounds not expressly set forth in any Act of Congress remains uncertain. In the Yasui case Judge Fee of Oregon held that it could be lost in other ways. Yasui was born in this country of Japanese parents, had visited in Japan, and had acted here as a propaganda agent for the Japanese government until the outbreak of the war in 1941. Such actions, Judge Fee said, constituted evidence of Yasui's election to be a Japanese rather than an

American citizen. But on appeal the Government did not press this point, so it remains unadjudicated by a higher court.

Aspects of Rights Here Protected

No clauses of the Constitution have been more often invoked unsuccessfully than the "privilege and immunity" sections. They benefit only natural persons, not corporations. Moreover, they benefit only citizens, not aliens. They overlap in certain particulars, yet are wholly distinct in others.

The clause of the original Constitution includes the rights derived from state citizenship and protects a citizen against discrimination by a state other than the one where he resides, but it does not protect him against acts of his own state. The clause of the Fourteenth Amendment covers only the rights derived from national citizenship, but protects these against interference by the state of a citizen's residence. It is impossible here to trace all the varied decisions under these two clauses, and it is unnecessary since most of them cover property rights rather than civil liberties.

Since the clause in the original Constitution forbids only discrimination, it does not permit a citizen of one state to carry over into another all the rights he had in the first. Thus it does not forbid states from having varied rules with regard to qualifications for voting or residence requirements for the exercise of other rights. But while a state may not impose a burden on citizens of outside states that it does not impose on its own citizens, it may confine to its own residents the right to engage in certain occupations such as acting as insurance agents, or may give to its own citizens the sole right to use state property and therefore may forbid citizens of other states to plant oysters in state waters.

In 1823 Judge Washington of the Supreme Court, while sitting on Circuit, attempted an enumeration of the rights protected by the privileges and immunities clause of the original Constitution. His statement has often been quoted, though never accepted as correct in its entirety. He said:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union. . . . They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through, or to reside in any other state. . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Shortly after the Civil War, Congress attempted to protect the Negro in some of his newly found civil rights. In the Enforcement Act of 1870 Congress set forth punishments for conspiracy to deprive any citizen "of any right or privilege granted or secured to him by the Constitution." Prosecutions were instituted against persons who had interfered with Negroes in their attempts to meet and to vote. The Supreme Court in the Cruikshank case ruled that such prosecutions were beyond the scope of the statute, or indeed of Congressional power. The Court indicated that the result would have been different had the indictment stated that the meeting in question had been called to discuss national affairs, or if it had charged that there had been interference with voting because of the race of those desiring to vote.

When the C.I.O. sued Mayor Hague of Jersey City to prevent the breaking up of meetings, it indicated in its complaint

that its members wanted to meet in Jersey City to discuss the National Labor Relations Act. Consequently, three of the justices of the Supreme Court (Hughes, Roberts, and Black) rested their approval of the injunction against Mayor Hague on the privileges and immunities clause of the Fourteenth Amendment. Justices Stone and Reed concurred in the result, but on the ground that the due process clause had been violated and that not citizens alone, but all persons should be protected in the exercise of rights of free speech.

On the other hand, the exercise of the right of free speech, when unrelated to federal subjects, is clearly not a right of national citizenship; therefore interferences with that right by private persons may not be criminally punished by Congress. Protection of such rights of citizenship rests with the states, which are more often motivated by considerations of local prejudice than is Congress.

Certain rights are clearly a part of national, as distinguished from state, citizenship. Among these should be mentioned the right to vote for national officers, to travel from state to state, to enter public lands, to be protected from violence while in the custody of a federal officer. In some cases, at least where state officers are involved, the right to be free from arbitrary arrest is part of the due process of law guaranteed by the federal Constitution.

It is clear that the right to vote for members of Congress and presidential electors is a right of national citizenship protected by the Fourteenth Amendment. Therefore it is within the power of Congress to punish any interferences with this right. But since the states may determine the qualifications of voters, the courts have rejected several attempts which have been made to invalidate poll taxes imposed by various Southern states on the ground that such taxes burden a privilege of national citizenship. We shall discuss this subject more fully in the chapter dealing with the suffrage.

It has often been said that the right to travel freely from one state to another is one of the privileges and immunities guar-

anteed both by the original Constitution and by the Fourteenth Amendment. Judge Washington, as we have seen, included it in his list. In the Slaughterhouse cases this right was somewhat more narrowly described as including the right to go to the capital, to the seaports, and to the various courts and offices of the national government. The precise question never came before the Supreme Court until after the depression of 1929–33.

That depression revived many old laws against paupers. Some of these permitted the removal of a person on relief to the state from which he came; others punished persons who brought an indigent person into the state. Tests of laws of both types were attempted. A case from New York which involved the "deportation" type of law failed for procedural reasons. The other test, the Edwards case, came from California. Twice argued in the Supreme Court, it resulted in a unanimous decision that the law was in conflict with the Constitution. Five of the justices (Stone, Roberts, Frankfurter, Reed, and Byrnes) based their decision on the commerce clause; four of them (Black, Douglas, Murphy, and Jackson) on the privileges and immunities clause. The value of the majority decision rests in the fact that it applies to aliens as well as citizens. The arguments of the concurring minority are also of sufficient interest to warrant brief discussion.

Justice Douglas argued that at the time of the adoption of the Fourteenth Amendment it had already been judicially determined that the right to move from state to state was an attribute of national citizenship and that this had been recognized by the Supreme Court many times after the adoption of the Fourteenth Amendment. He objected to permitting one state to interfere with the free movement of American citizens merely because they were destitute:

> But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly

incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality.

Justice Jackson pointed out in a separate opinion that the states were bound to receive aliens admitted by the national government: could the rights of citizens be less? If so, then "the world is even more upside down than I had supposed it to be." On the subject of indigence he said:

Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire. . . .

A contention that a citizen's duty to render military service is suspended by "indigence" would meet with little favor. Rich or penniless, Duncan's citizenship under the Constitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument. Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a

promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.

The Supreme Court has never considered whether the right to be free from lynching or arbitrary arrest is also a privilege of citizenship. In Arkansas certain state law enforcement officers were charged with having caused inhabitants of the state to be arrested on false charges, in order to extort money from them as a condition of their being released, and with having assaulted various of the victims pursuant to the scheme. The evidence for the prosecution showed that police officers conspired with the keeper of a jail, with an inmate who was the head of the "kangaroo" or inmates' court, and with a lawyer, to extort money from innocent people, and that they beat them if they refused to pay up. The defendants claimed that the people arrested were all violators of the law and that there were no beatings. The jury found most of the accused guilty. The Circuit Court of Appeals for the Eighth Circuit, in St. Louis, unanimously affirmed the convictions. It ruled that the due process clause protected all person from arbitrary action on the part of state officers, that Congress had the power to punish a state officer who violated his obligation, and that the right to be free from arbitrary arrest was also a privilege and immunity secured and protected by the Constitution, and therefore within the scope of the Enforcement Act of 1870, now known as the Civil Rights Law.

It is under the same law that the Department of Justice proceeded against state officials in Mississippi, who were charged with neglect that made possible the lynching of three Negroes. A federal grand jury returned indictments, but the trial jury acquitted the defendants. For many years bills have been introduced in Congress which would punish all persons who have any part in a lynching. The passage of such laws has always been blocked by filibustering on the part of Southern Senators. The constitutionality of such laws has been questioned since they punish not only state officials but private individuals

as well, and the Supreme Court has repeatedly ruled that all the provisions of the Fourteenth Amendment guarantee protection against state action alone. Private wrongdoing may be punished by the states, not as a rule by the federal government. The leading case in this field arose upon a consideration of the equal protection clause of the Fourteenth Amendment, which we will consider in the following chapter.

Equal Protection

EQUALITY before the law is of the essence of democracy. It is implicit in the statement of the Declaration of Independence that all men are created equal. Yet the Constitution gave no expression to this noble thought. The fact of slavery would have made a mockery of any assurance of equality in a covenant intended to define legal rights. Hence it was not until after the Civil War and the abolition of slavery by the Thirteenth Amendment that equality could find legal expression. Even then the guaranteed equality was of a limited kind, only of the "equal protection of the laws." Moreover, since the Fourteenth Amendment in which this was embodied was designed primarily to protect the newly freed Negro against discrimination and deprivation of rights by the states in which slavery had but recently been outlawed, the amendment referred only to the states. It afforded no protection against the federal government, for none was thought necessary. It said nothing about individuals because laws were not made by individuals. That other, non-legalistic forms of discrimination might be equally disastrous to the Negro was not taken into account. The Amendment reads:

> . . . nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

This guaranty does not apply to discrimination by the federal government or by individuals, nor even to segregation ordered by the state. No harmful consequences have resulted from the first omission since the federal government has never attempted to discriminate by law against either the Negro or any other minority, unless the mass evacuation of citizens of

Japanese ancestry from the West Coast just after Pearl Harbor be so considered. It is probable, indeed, that the Supreme Court would denounce any ordinary discrimination based on race as a deprivation of due process. But the literal restriction of the amendment to state action has prevented Congress from punishing individuals for serious infringements of the rights of Negroes. And the rulings that segregation is not discrimination have given sanction to many practices offensive to the Negro race.

The equal protection clause has nevertheless proved useful in various respects, for it protects both the citizen and the alien, the individual and the corporation, and all minorities, whether racial or religious, as well as the Negro for whom it was originally designed. Yet there are many circumstances in which it has been held that citizenship may form a proper basis for differentiation. Aliens may be forbidden to own real estate, for example, or to engage in certain occupations such as the practice of the law. Although no hard and fast rule has been laid down by the courts on this subject, it is established that ordinary occupations cannot be barred to aliens.

The Amendment Does Not Affect Acts of Private Persons

Shortly after the adoption of the Fourteenth Amendment, Congress passed various laws which prohibited the exclusion of Negroes from places of public entertainment such as inns, and from public carriers such as railroads. In 1883, in the Civil Rights cases, the Supreme Court declared that such legislation was beyond the power of Congress on the ground that the Fourteenth Amendment was by its terms applicable only to state action, not to private wrongdoing. Justice Harlan wrote an eloquent dissent, from the close of which we quote:

> Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race dis-

> crimination. If the constitutional Amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

The rest of the Court believed that the rights of Negroes "may presumably be vindicated by resort to the laws of the State for redress." This expectation has not been fulfilled, although some states like New York have a good record in this respect. But even in New York adequate legislation was not adopted for more than half a century after the Civil War was over. It was not until 1938 that protection against discrimination by private individuals was written into the State Constitution.

This early ruling—that the Fourteenth Amendment did not apply to wrongs done by private persons—has been consistently adhered to by the Supreme Court. The Court even held that a suit could not be maintained under a law which forbade discrimination by all carriers to recover penalties against a steamship company engaged in interstate commerce, although conceding that Congress might have prohibited discrimination by such carriers. Because the law then in force was aimed at all carriers, it was beyond Congressional power. Later, Congress limited the prohibition to discrimination by concerns

engaged in interstate commerce alone. Then the Supreme Court, in the Mitchell case, upheld a claim based on a Negro's exclusion from a Pullman car and directed the Interstate Commerce Commission to take action with regard to his complaint.

On the same general theory that the Fourteenth Amendment did not reach private acts, the Supreme Court decided that federal courts were powerless to interfere with the exclusion of Negroes from voting in Texas primaries, despite the fact that the primary is the only election that counts in Texas. The Court has also refused to pass on the validity of provisions often inserted in deeds of real estate, by which the purchaser agrees never to sell the land to a Negro.

When Is Segregation Not Discrimination?

It has puzzled many observers that, despite the existence of the equal protection clause in the Constitution, Negroes are by law compelled to keep away from white persons in railroad stations and on trains, trolleys, and buses in the South, and to attend separate schools there and sometimes even in the North. There are also laws in many states that forbid the intermarriage of white persons with Negroes and that punish adultery more severely if the parties are of different races. All these laws remain in force in consequence of the Supreme Court's ruling that the Fourteenth Amendment does not forbid segregation but only inequality. The Court has never faced the reality that segregation necessarily implies inequality, for equals do not hesitate to mingle with each other in public places. Any traveler in lands where segregation is practiced, be it the South where the victim is the Negro or Nazi Germany where it is the Jew, knows that segregation is a badge of one race's claim to superiority over the other.

These segregation decisions of the Supreme Court go back to the case of Plessy v. Ferguson, decided in 1896. That involved a state law which compelled separate railroad accommodations for Negroes and whites. The majority of the Court upheld the law, pointing out that if there was any feeling of

inferiority it arose not from the law but from the consciousness of the Negro. Mr. Justice Brown said:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.

Justice Harlan again wrote a salutary dissent:

> The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.
>
> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of

> servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done.

The same principle was applied to laws compelling separate schools, this time in a case brought on behalf of a Chinese child. In the case of the schools, the assumption that equal accommodations would be available is shockingly false because of the unwillingness of the authorities to devote to Negro schools the same amount of money which they are willing to pay out for white ones. This is particularly true in connection with salaries paid to the teachers. Litigation to compel the payment of the same salary scale to Negroes as to white teachers has partly corrected this inequality. But progress by such methods is slow and piecemeal. Nor do salary suits, even when successful, insure sufficient appropriations in other areas of school activity.

In a case coming from Missouri the Supreme Court put a stop to a particularly unusual form of discrimination, without in any way breaching the rule concerning segregation. A Negro was denied admission to a state law school and offered the right to go, at the state's expense, to a law school in a neighboring state. The majority of the Supreme Court ruled that this was an improper condition and that Missouri must either set up a law school for Negroes or let Negroes enter the law school already in existence. So Missouri set up a separate school.

The Supreme Court has also held void a state law which permitted a railroad to provide dining and sleeping accommodations for white persons only, that being a clear denial of equality. But the Mitchell case shows how false is the assumption that equal accommodations would be available for Negroes even when no law prohibits such equality. It appeared that, unless a drawing room was available, the Pullman Company would not permit a Negro to occupy space in the Pull-

man car in states where segregation was compelled by law. That was a denial of equality, said the Supreme Court, but Chief Justice Hughes took pains to point out that the decision had no application whatever to the validity of segregation laws.

The peculiar kind of segregation involved in the laws which deal with the relations between the sexes the courts have glossed over by pointing out that they bear equally on white and black. Although this may be technically true, a law which forbids intermarriage between the races, or punishes adultery more severely if one of those involved is a Negro, cannot be said to treat the races as being on an equal footing.

Only in one field has the Supreme Court struck down segregation laws. That is in the field of housing. Those decisions, however, do not really rest upon the equal protection clause, although one would suppose that the impossibility of achieving even an appearance of equality in this field would have been apparent. Actually, the Court struck down these segregation laws because they interfered with the rights of property owners freely to dispose of their property—that is, because they denied due process rather than because they denied equal protection.

Other aspects of the problem arose out of the Second World War, although technically they do not arise under the equal protection clause since they challenge action of the federal government. The military authorities on the West Coast imposed curfew regulations upon all persons of Japanese ancestry, both citizens and aliens, and then ordered their evacuation and confinement in camps. The Supreme Court unanimously upheld the right of the military to impose the curfew regulations, finding it unnecessary in the particular case to pass on anything else. Chief Justice Stone recognized that distinctions between citizens because of ancestry were "odious to a free people." In the present case they were justified because in time of war "residents having ethnic affiliations with an invading enemy may be of greater source of danger than those of different ancestry." Mr. Justice Murphy, concurring

specially, believed the decision went "to the very brink of constitutional power" and said:

> Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals.

Another problem has arisen in connection with action by draft boards. These have called up Negroes and whites separately. They have been trained in different camps, assigned to different army units. A Negro by the name of Lynn challenged his induction into the army on the ground that this violated an express provision of the draft law which forbids discrimination. The Circuit Court of Appeals for the Second Circuit, Judge Clark dissenting, held that the army has the right to segregate Negroes, and therefore draft boards can order them to report separately.

Jury Service

This is the one field in which the Supreme Court has consistently set its face against all forms of discrimination though the practical results of its decisions have not been very great. At first the Southern states passed laws expressly excluding Negroes from jury service. After the Court held that these laws were unconstitutional, subtler attempts at exclusion were practiced. Negroes' names simply did not appear on the jury lists, although the state laws with regard to jury service were free from any possible criticism. In a few cases the Supreme Court reversed convictions of Negroes where the state in effect admitted that discrimination had been practiced by the persons responsible for the selection of jurors. However, unless the state admitted discrimination, the Supreme Court refused to interfere merely on claims of discrimination unsupported by actual proof. And the proof was difficult to obtain.

Not until the second Scottsboro trials in 1933 was a really successful technique developed for establishing discrimination. In that case counsel for the defendants brought to court

a large number of Negroes who testified that they were qualified for jury service but had never been selected. The jury commissioners denied that they had intended to discriminate against Negroes and claimed that they had known of no qualified Negroes. The state courts accepted the contention of the jury commissioners. But the United States Supreme Court concluded that such denials were worthless in the face of a long history of failure to place Negroes on jury lists. Since then, convictions have been reversed on the same ground in cases coming from various other Southern states. In consequence, Negroes have been called for jury service. But the Court has made it clear that mere lip service to the Constitution will not do. In a case where there were some Negroes on the list who were so placed that they would practically never be called for service, Mr. Justice Black pointed out that chance alone could not have brought about that result. He said:

> If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

Nevertheless, in many places it is easy for the prosecution to eliminate all Negroes who may be called in a particular case. A jury list is furnished to both sides; these then alternate in striking names off the list, a process which continues until only twelve names remain. Since the prosecution will always know which of the names are those of Negroes and since there never will be many Negroes on any list, it is a simple matter for it to get rid of all Negroes.

Selection of juries has also been challenged in cases not involving Negroes. Many states do not permit women to sit on juries. It seems clear that no man could object to such exclusion of women. It has not yet been decided whether a woman could object. However, it is reasonable to suppose that if women are eligible for jury service by law, a woman could object to the systematic exclusion of members of her sex. Claim has also been made in some cases that working men

had been improperly kept off the lists or that political factions had been discriminated against. No case involving any of these claims has yet reached the Supreme Court. That Court did refuse to pass on a contention raised on behalf of the sharecropper, Odell Waller, that his conviction was improper because those who did not pay poll taxes had been excluded from jury service. However, the Court's refusal was probably based on the fact that this claim had not been raised in the state court at the proper time.

One thing is certain: no one has the right to have either the grand jury which indicts him or the petit jury which tries him composed entirely of members of his own race, sex, class, or political faith, or even the right to have on such a jury some representative of that group. The Constitution assures merely that there shall be no discrimination in the selection of either grand or petit jury.

Other Kinds of Discrimination

The equal protection clause is not limited to the protection of the Negro nor to the protection of personal rights. Any law is void that discriminates without reasonable basis for the classification made by the law. Likewise, any administrative action which applies a proper law in a discriminatory manner is invalid. In line with the first principle, many state regulatory laws and state taxes have been set aside, sometimes on reasoning difficult to understand.

In 1921 the Supreme Court, over the dissents of Justice Holmes, Brandeis, Clarke, and Pitney, held unconstitutional an Arizona law which restricted the issuance of injunctions in labor disputes on the ground that there was no rational basis for a special classification of these disputes when dealing with injunctions. Subsequent history has shown the error of this decision, and modern laws of the same kind have been sustained, although the Supreme Court has never expressly overruled the Arizona decision.

The basic rule with regard to discrimination by adminis-

trative agencies was established long ago in the Yick Wo case which involved a laundry licensing ordinance of San Francisco. Complaint was made that it was used only against the Chinese. In consequence, the conviction of a Chinaman for violating the ordinance was set aside. Such claims have been made in more recent times in cases involving unpopular minorities such as Jehovah's witnesses. Thus far the Supreme Court has not rested any of its decisions in cases involving this group on the equal protection clause. Similar contentions have been made with equal lack of success in criminal syndicalism cases where the contention has been that the laws punished only those who advocated the use of violence to alter the status quo, not those who advocated violence to preserve the existing order. The answer to these claims has always been that a legislature can pick and choose according to its view of what should be punished and need not punish all possible wrongs. Nor is the equal protection clause available as a defense to a criminal prosecution on a showing that many other guilty persons have not been prosecuted. The result might be different, however, if a defendant could show a pattern of discrimination in the choice of those prosecuted, which was based on their race, color, class, or some other special factor.

A curious instance of the application of the constitutional guaranty of equal protection is the case of Cochran v. Kansas. A convict sought a writ of habeas corpus in the state courts, claiming that his conviction was void for various reasons and that he had been denied an opportunity to appeal from the conviction itself. The state courts rejected his contentions, pointing out that he had been represented by a lawyer. The Supreme Court, however, ruled that the state court should have held a hearing on the claim that there had been a suppression of the appeal, not on the ground that there was a constitutional right to such an appeal under the due process clause, but on the ground that the equal protection clause had been violated because other convicts had been treated differently from this one. The opinion, it may be remarked, does not

disclose the particulars of this different treatment, but the record and briefs show that the discrimination was against convicts who had no relatives or friends to act for them.

The majority of the Supreme Court, however, refused, in Snowden v. Hughes, decided January 17, 1944, to follow the implications of the Cochran case. Mr. Snowden claimed that he had been improperly denied election in the Republican primaries in Illinois. But he did not contend that the canvassing board had counted him out because of discrimination based on racial, class, or political considerations. Chief Justice Stone said that there must be "purposeful discrimination" to bring the equal protection clause into play; that mere error in applying state law did not have such result. But Justices Douglas and Murphy thought that Snowden should have his day in court to prove the basis of the denial of equal protection which he had set forth in his papers.

Ordinarily the Supreme Court will accept the classification adopted by a state legislature. But the Supreme Court has the last word on what is a reasonable classification. If it considers that the classification is unreasonable, it will set the law aside. Accordingly, in 1942 it held void an Oklahoma sterilization law because it applied to certain kinds of criminals and not to others, and because no rational basis existed for the distinction. Under the statute embezzlers could not be sterilized but ordinary thieves could be. As Mr. Justice Douglas said, the inheritability of criminal traits does not follow any such fine legal distinctions between crimes.

Suffrage

IT was first suggested in the Constitutional Convention of 1787 that the franchise be vested in the "people." A persistent minority in the Convention attempted to prevent this. They sought to have the members of both houses of Congress elected by the state legislatures or, if the people must have some part in the election machinery, to limit the suffrage to those who were "freeholders"—that is, owners of land. These attempts were ultimately defeated, partly because Benjamin Franklin put his weighty voice in opposition. As finally approved, however, the Constitution contained no suffrage guaranties whatever. Senators were not to be elected by the people and it was left to the states to determine the qualifications for voting for Representatives. The only protection afforded was the direction that the states could not restrict voting for members of Congress any more than they restricted voting for members of their own legislature. That the states might impose various restrictions was recognized. Indeed, the Convention expressly rejected a proposal that Congress might change the qualifications adopted by the states. Moreover, it was doubtful whether the people would have any choice in the selection of presidential electors, because there was no express provision that these had to be elected; they might have been chosen by the legislature. In the original Constitution there were, finally, no guaranties whatever against discrimination. These were provided first with regard to Negroes as the result of the Civil War, then in 1920 with regard to women. Before this last reform was adopted, the demand for popular election of Senators had borne fruit in the Seventeenth Amendment.

There are numerous constitutional provisions dealing with this subject of suffrage:

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.—Article I, Section 2, clause 1.

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.—Article I, Section 4, clause 1.

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors . . . —Article II, Section 1, clause 2.

The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.—Article II, Section 1, clause 4.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.—*Fourteenth Amendment, Section 2.*

The right of citizens of the United States to vote shall not

be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.—Fifteenth Amendment, Section 1.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.—Seventeenth Amendment, clause 1.

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.—Nineteenth Amendment, clause 1.

It is quite apparent that the provisions of the original Constitution have nothing to do with elections for state officers. In contrast, the post-Civil War amendments, in so far as they prohibit discrimination, affect all elections, whether for national, state, or local officers. Consequently Congress has power to adopt general laws affecting elections only if limited to federal elections, but it can also legislate in connection with state elections to prevent discrimination on the grounds stated in the Fifteenth and Nineteenth Amendments. These grounds are race, color, previous condition of servitude, or sex. Likewise, federal courts can interfere with state action in election matters only to the same extent that Congress may legislate directly. Since the Supreme Court has ruled that voting is not a privilege of national citizenship, neither Congress nor the federal courts can interfere with discrimination in state elections which is caused only by the acts of private persons.

Qualifications for Voting

The power given by the Constitution to the states to determine who shall have the right to vote has been variously exercised. It should be borne in mind that at the time the Constitution was adopted manhood suffrage did not exist in the United States except in Vermont. Property qualifications for voting were general, though a growing merchant and arti-

san class had caused a liberalization of the old laws which had at one time restricted voting to landowners. In several of the states there were also religious qualifications. After the Mormons had become powerful enough to call forth repressive measures, bigamists were denied the right to vote. More recently many states have imposed literacy tests. And from time immemorial paupers have been denied the right to vote.

The age at which a person can vote is also dependent entirely on state constitutions or laws. Twenty-one has not always been the qualifying age. Nor is voting necessarily confined to citizens. During the years of large immigration into this country, there were many states which permitted aliens to vote. While the Constitution itself does not restrict the suffrage to citizens, the amendments prohibiting discrimination benefit only citizens.

Attempts to Disenfranchise

There have been various attempts to disenfranchise part of the population, or at least to make it difficult for certain groups to vote. Literacy tests can easily be used to disenfranchise many people. In some states property owners are favored by being freed of residence requirements imposed on others, or by being spared taking a literacy test. In Mississippi—and, until 1933, in Pennsylvania—no one could vote without paying all taxes imposed within the preceding two years. In a considerable number of states poll taxes are exacted. None of these restrictions have been successfully challenged in the courts.

Furthermore, several of the Southern states resorted to devices designed to prevent Negroes from voting. The commonest of these was known as the "grandfather clause." This exempted from literacy tests or property qualifications those persons who had been entitled to vote prior to 1866 or were descended from such persons. The Supreme Court in 1915 held such laws to be void as their obvious purpose was to prevent Negroes from voting.

After this decision Oklahoma attempted a subtler method

of disenfranchisement. It restricted the franchise to those who had voted in 1914 while the grandfather clause was in effect, or who registered during a short period just after the new law went into effect. The Supreme Court, over the dissents of Justices McReynolds and Butler, also set this law aside. Justice Frankfurter said:

> The Amendment [the Fifteenth] nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.

Since then the chief reliance of the dominant power in the South has been the poll tax and the white primary, both of which have been approved by the Supreme Court.

The White Primary

In some of the Southern states, notably Texas, the election itself is a mere formality, since only Democrats are ever elected. What is important is the Democratic primary. This is evident from a comparison of the size of the vote. Over a long period of years, nearly twice as many people voted in the Democratic primary in Texas as voted for all parties in the general election. Negroes may vote at the general election, but not at the primary.

Originally this discrimination resulted from an express provision in the state law. In 1927 the Supreme Court unanimously declared that it violated the Fifteenth Amendment. Then the Texas legislature changed the law and gave each political party the right to prescribe qualifications for voting in the primary. Again the Supreme Court struck down the law, this time by a 5–4 vote. Justices McReynolds, Van Devanter, Sutherland, and Butler dissented on the ground that the discrimination no longer resulted from any command of state law. The majority, by Justice Cardozo, relied on the fact that the law entrusted the decision to the executive committee

of the party, not to the party membership or convention. The state convention took the hint and excluded Negroes from membership in the party. Therefore, when a third case reached the Supreme Court in 1935, the exclusion had been by vote of the convention, not by the executive party committee acting under the state law previously held void. Accordingly, Justice Roberts held that the Court could not interfere—and there were no dissents.

The question came before the Supreme Court again in 1944. In the meantime the Court had indicated in the Classic case that the provisions of the federal Constitution apply where a primary election in effect controls the final result.

The Poll Tax

Poll taxes are of ancient origin. In some states they are as small as a dollar a year, in others they are larger in amount. In some instances the law requires payment of all accumulated poll taxes before a person may vote. The burdensome quality of this kind of tax arises mainly from the necessity of paying it at a date prior to registration time, so that many a person who goes to register finds out, too late, that he is disqualified because he has not paid the poll tax.

The constitutionality of this form of taxation was long taken for granted. In 1935 the Supreme Court unanimously sustained such a tax against challenge on various grounds. It was urged, first, that the tax violated the equal protection clause because cumulative for men but not for women, and because it exempted minors and persons over sixty-one. This ground of objection was easily disposed of. Justice Butler pointed out that there were reasons for all the exemptions, and it was not for the Court to pass on the sufficiency of the reasons. He emphasized the small amount of the tax and concluded that it was not imposed for the purpose of abridging the voting privilege.

Justice Butler rejected a further challenge based on the privileges and immunities clause because it had long ago been

settled that the right to vote was derived from the state and not from the national government. In the case in which the decision was made this argument was difficult to answer since that particular election embraced state as well as federal offices. In a later case only an election for a member of Congress was involved, yet the lower courts followed the rule laid down in the earlier case and the Supreme Court refused to review their decision.

In the light of these two cases, it is doubtful whether further legal tests of the poll tax would be worth while. Since then, attack on the poll tax has shifted to Congress. That body, in the fall of 1942, declared that no soldier should be deprived of his vote because he had failed to pay any poll tax. And the House of Representatives, both in 1942 and in 1943, passed a bill outlawing the exaction of any such tax as a condition of voting for federal office. Threat of filibuster prevented either measure from being voted on in the Senate.

There has been much difference of opinion regarding the constitutionality of any such law. Some of its proponents argue that Congress has the right to fix the qualifications for voting for federal offices. Others rely on Congressional power to prevent fraud in elections for federal officials, pointing out the possibilities for manipulation that result from the poll tax, with a small electorate determining the election, and the payment of taxes a means of procuring votes. Still others believe that the guaranty of a republican form of government, contained in Article II, Section 4 of the Constitution, authorizes Congress to see to it that all citizens vote who are not disqualified by reason of criminality, imbecility, or ignorance.

There is another possible attack on the poll tax. The much forgotten second section of the Fourteenth Amendment provides for the reduction of a state's representation in Congress in proportion as citizens over twenty-one are denied the right to vote, except on ground of conviction for crime. It has never been enforced. But it could have an important effect on the poll tax and other restrictions on voting. For the fact is that

in the poll tax states the number of voters is materially smaller in relation to population than in the non-poll tax states. For instance, in 1932 the presidential vote was 18.2 per cent of the population of voting age in Alabama and 17.1 per cent in Georgia, compared to 68.7 per cent in New York, 67.6 per cent in Wisconsin, and 70.2 per cent in California. To be sure, it might not be possible to establish that the difference was entirely due to restrictive laws; there might be a greater interest in the North, especially because of the greater uncertainty about the outcome in particular states. But there can be no doubt that a Congressional investigation would disclose a material reduction in voting potentiality because of poll tax laws and literacy requirements, large enough to require a substantial reduction in the representation of the states concerned.

It has been argued that this section of the Fourteenth Amendment applies only to state restrictions that violate some other provision of the Constitution. Such a construction would, however, deprive the provision of all meaning, especially since at the time the Fourteenth Amendment was adopted (1868) the restrictions imposed by the Fifteenth Amendment had not yet come into existence. Moreover, if only unconstitutional restrictions had been in the minds of the draftsmen of the provision, there would have been no necessity for the express statement that denial of the right to vote because of conviction for crime should not affect a state's representation. Naturally the political difficulties in the way of enforcing this amendment are stupendous.

If none of the indicated methods proves successful in abolishing the poll tax, it may be necessary to propose a constitutional amendment guaranteeing the suffrage to all adult citizens not disqualified because of conviction for crime.

Congressional Power over Elections for Federal Offices

While the Supreme Court has held that it was beyond Congressional power to punish private persons for interfering with the efforts of others to vote at elections for both state and na-

tional offices, it has upheld federal prosecutions for interference with voting at national elections. At one time there was doubt whether Congress had power to include the primary election within these provisions. In the Classic case the Supreme Court unanimously held that the right to choose a candidate for Congress at a primary election was included in the right to choose representatives guaranteed by the Constitution, at least in those states where the primary was by law "an integral part of the procedure of choice" or where, in fact, it "effectively controls the choice."

A Place on the Ballot

The United States Supreme Court has recognized the importance of political parties and their right to select candidates in primary elections. But parties cannot function unless they get a place on the ballot. Most states make it difficult for minority parties to stay on the ballot or to get back, once ruled off. Undoubtedly there must be some restrictions; otherwise there would be unnecessary expense to the state and confusion among the voters. It is probable that most of the existing laws on this subject are not open to challenge in the courts, even though they do create great difficulties for minority parties. But if the restrictions are so burdensome as, in effect, to bar all new parties, then they are void. Thus a California law which required a party to have had 2,500 registered members at the last preceding primary, usually two years before the election, was struck down by the California supreme court as unreasonable.

When the ballot laws are designed to bar particular groups from the ballot because of their opinions, the courts will scrutinize the laws to assure a reasonable relationship between the grounds of exclusion and the public welfare, and a proper opportunity for a hearing on the claim that a particular group violates the law. Through such procedure, the California supreme court decided that the legislature could not validly bar from the ballot any party which called itself Communist or

was affiliated with the Third International or with any foreign agency, party, organization, or government, though it did have power to bar a party dominated by a foreign government or one which advocated the violent overthrow of the government. In the same case, the court held void a provision of the law which gave the Secretary of State discretion to determine whether a particular party did advocate violent revolution, because no provision had been made in the law for a hearing.

But the United States Supreme Court has ruled that the right to a place on the ballot was not a property right and was thus not protected against arbitrary state action by the due process clause. Denial of a place on the ballot because of discrimination based on race, class or opinion would be a denial of equal protection and so prohibited by the federal Constitution.

Labor Problems

AT the time the Constitution and the Bill of Rights were being framed organized labor was practically nonexistent. Indeed, the attitude of the law discouraged organization, for it had long been considered criminal for workingmen to "conspire" together to better their lot. This view lasted well into the nineteenth century. It had scarcely been dissipated at the time when the post-Civil War amendments were being drafted; hence labor lacked sufficient strength to secure consideration of its rights in these amendments. Labor has managed since then to achieve legal recognition of rights without the benefit of any special constitutional guaranties. At first, to be sure, the courts used the Constitution to labor's detriment in preventing the abolition of yellow dog contracts. But the expanding notion given to freedom of speech and of assembly in nonlabor cases eventually redounded to labor's benefit. Today the Constitution no longer stands in labor's way and at least certain rights cherished by labor, such as peaceful picketing, have received some measure of constitutional protection.

In the states labor has been more successful in obtaining the insertion of special constitutional provisions for its benefit, although it can hardly be said that these have been of much practical value. Arizona and Utah forbid black lists; these two states and a few others require an eight-hour day on public works. In 1938 New York adopted a provision in its constitution guaranteeing collective bargaining.

Yellow Dog Contracts

A yellow dog contract is a device invented by employers toward the end of the nineteenth century to head off union

organization among their employees. Each employee was required to sign a contract agreeing that he would not join a labor union. These contracts proved so successful in achieving their purpose that organized labor sought and obtained the aid of Congress and state legislatures. Many laws resulted declaring such contracts to be illegal. But the courts stepped in on the side of the employers. They invoked the idea current at the time that interference with freedom of contract was a deprivation of liberty prohibited by the due process clauses of the Constitution. The United States Supreme Court, though not without the registering of dissents, reached the same conclusion.

It was logical that the Supreme Court thereupon should approve the use of injunctions against labor unions that tried to induce employees to disregard these contracts. Not all state courts, however, followed the Supreme Court in this approval. In New York, for instance, the highest court could see no justice in a result which allowed the employer to fire an employee at any time and still allowed him to prevent the employee from joining a union so long as he remained in his employment.

Again organized labor sought help from the legislatures. Again laws were passed directed against the yellow dog contract. This time, however, the exaction of such a contract was not made a crime. The new laws simply declared such contracts to be unenforcible, and especially declared that no injunction should be used to enforce them. This time the courts have not interfered. To be sure, they have not been asked to; in the main industry has accepted the new legislation without challenge. This attitude is the result not so much of any generosity on the part of employers as of a realization that other developments in the field of labor law had completely destroyed the yellow dog contract. For the courts had at last recognized that collective bargaining was a right of labor that had social values which Congress and state legislatures could protect, a right wholly inconsistent with the yellow dog contract.

Collective Bargaining

The development from conspiracy to protected right took about a century. In the early part of the nineteenth century it was considered criminal for workingmen to come together for the purpose of bargaining collectively with their employer. By the early part of the twentieth century Congress had guaranteed the right of workers on interstate railroads to bargain with their employers through representatives of their own choosing and had set up machinery to work out the problem. In 1930 the Supreme Court unanimously approved the validity of the legislation. As Chief Justice Hughes said:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

One of the early acts of the New Deal was to extend this protection to all workers in interstate industry by the National Labor Relations Act sponsored by Senator Wagner. The new law was at once subjected to attack by employers in all parts of the country who declared that it was unconstitutional on various grounds, especially on the ground that the commerce clause of the Constitution did not permit Congress to regulate the affairs of manufacturing plants merely because the

raw materials they used or the goods they made crossed state lines. Enforcement of the law was practically nullified by injunctions. A large number of distinguished lawyers solemnly asserted that the law was unconstitutional. But the Supreme Court disappointed the employers. It not only held the new labor legislation valid but gave so broad an interpretation of the commerce clause that any employer is subject to the Wagner Act if a strike of his employees might interfere with interstate commerce. To illustrate, the Consolidated Edison Company of New York is subject to the law because it supplies fuel to transportation companies.

The right to organize and bargain collectively is thus firmly established in the law. True, it has received no constitutional protection. The extent to which the right to organize may be protected by the guaranty of freedom of assembly has not been explored. It is conceivable that Congress, or any legislature, could enact laws of a nature exactly opposite to the existing one. That has not yet been attempted, but some states have imposed restrictions on activities of labor which have generally been considered an inseparable part of the bargaining process—particularly the right to exert pressure by striking and picketing.

Restrictions on Picketing

The status of picketing was for a long time uncertain. Many judges declared that since the objective of picketing was to exert pressure it was illegal, whether peaceful or not. Other judges ruled that group picketing was unlawful on the ground that it was bound to have an intimidating effect. The notion that peaceful picketing was a form of communication of an idea, thus an aspect of free speech and so guaranteed by the Constitution, was advanced by a few judges in the early 1930's. It received its first sanction in the United States Supreme Court in a casual statement by Justice Brandeis that the right to picket was based on the right of free speech.

A few years later, in 1940, over the dissent of Justice Mc-

Reynolds alone, the Supreme Court in the Thornhill case declared void an Alabama state law which completely banned all peaceful picketing. Justice Murphy left open the right of a state to punish threats of violence or mass picketing. Some states have restricted picketing by making it depend upon the vote of a majority of those employed in the particular shop or limiting it to actual employees. State court decisions on the validity of such provisions are in conflict.

Picketing is more often restricted by injunction than by statute. Because of the abuse of this legal weapon by employers, with the assistance of judges hostile to labor, Congress passed the Norris–La Guardia Act in 1932. This sharply curtailed the power of federal courts to issue injunctions in labor disputes and expressly forbade the enjoining of peaceful picketing. In view of the power of Congress over the jurisdiction of the federal courts, the constitutionality of this new law was beyond challenge. For a time it was narrowly construed by many lower federal courts and injunctions were issued against peaceful picketing on the theory that no labor dispute existed in the particular case—for example, when the picketing was by a union that had no members in the employ of the particular employer or when the basis of the dispute was racial rather than economic. But the Supreme Court has given real vitality to the Norris–La Guardia Act by rejecting all restrictive interpretations of it.

The Norris–La Guardia Act does not apply, however, when the dispute in no sense relates to conditions of employment, as in the case of a controversy between an association of fishermen and a canning concern to which the fishermen sold their catch. Such a controversy relates to the price to be paid for merchandise, not to wages for work done.

Questions arising under this law are problems of statutory construction rather than of the relation between peaceful picketing and free speech. For a development of that subject we must look to cases arising from the states, where the only

question which the Supreme Court can consider is the constitutional one. Many years ago the Supreme Court had declared unconstitutional Arizona's attempt to restrict the issuance of injunctions in labor disputes. That decision rested on the double ground that the law made legal various practices which were inherently illegal and that it violated the equal protection clause by treating labor disputes in a separate category. Justices Holmes, Brandeis, Pitney, and Clarke dissented. Sixteen years later the Court upheld a Wisconsin law which also restricted the power of the courts to issue injunctions in labor disputes. This time Justices McReynolds, Van Devanter, Sutherland, and Butler dissented. The majority ignored the equal protection clause on which the earlier case had rested. Justice Brandeis simply said that "one has no constitutional right to a remedy against the lawful conduct of another." He believed the two cases differed because the Wisconsin law legalized no inherently illegal conduct, as had the earlier Arizona law in the interpretation of the majority of the Court at that time. In any case, it is now clear that the Supreme Court will approve state laws limiting the use of injunctions in labor disputes. Even where there are no such laws, the validity of a state injunction will be considered by the Supreme Court if a free speech question was properly raised in the state court.

In 1941, for the first time, the Supreme Court set a state injunction aside on the ground that it was an interference with free speech. In that year and again in 1942 the Supreme Court decided two labor injunction cases. In each pair of cases it ruled once against labor and once in labor's favor. The grounds of distinction are not easy to make clear. The two 1941 cases turned on the question of violence, the 1942 cases on the relation between the person picketed and the labor dispute. In the Swing case of 1941 the Illinois court had sustained a ban on picketing on the ground that no members of the union involved were employed by plaintiff. Over the dissent of Chief

Justice Hughes and Justice Roberts, the Supreme Court set the injunction aside because the picketing had been altogether peaceful. Mr. Justice Frankfurter said:

> A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.

But in the Meadowmoor case the strike had been accompanied by violence, though the picketing itself had not. The state court banned all picketing on the ground that it was tainted by the violence. Justice Frankfurter for the majority of the Supreme Court upheld this ban, while pointing out that if an attempt were made to enforce the injunction improperly—for instance, when the coercive effect of the past violence had ceased—the issue could again be tested in the courts. Justices Black, Douglas, and Reed dissented. They rejected the notion that past violence could ever ban future peaceful picketing, at least in the absence of a finding that the violence had been planned or encouraged by the union. The remedy, said Justice Reed, "lies in the maintenance of order, not in the denial of free speech." Justice Black, in a separate opinion in which Justice Douglas joined, elaborated the facts and pointed out that the injunction prevented the discussion of matters of public concern, and that the picketing had not commenced until many months after the violence had ceased.

Then in 1942 the Court—again over the dissent of Justices Black, Douglas, and Reed, joined this time by Justice Murphy—sanctioned further breaches in the notion that peaceful picketing was protected as an expression of opinion. In the Ritter case the Texas supreme court had approved an injunction which banned all picketing at a restaurant owned by a man who had engaged a contractor to put up a building elsewhere in the same town, a building not connected with the restaurant business. The contractor employed non-union labor and

the union in the building industry picketed with signs indicating that the owner of the restaurant had employed a contractor who was unfair to union labor. The majority of the Supreme Court upheld the injunction on the ground that a state might properly confine picketing to an area having a relation to the dispute, the emphasis here being not so much on the fact that the place picketed was physically distant from the place where the work was being done, as upon the fact that the person picketed was not involved in the dispute, since the union's quarrel was with the contractor, not the owner. Justice Frankfurter said:

> But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.
>
> In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma.

Mr. Justice Black challenged the basis of this conception. He stressed the fact that the attitude of contractors on employing union labor might be influenced by those with whom

they did business and held that the union had the right to inform members of the public of the situation, so that they might "use their influence to tip the scales in favor of the side they think is right." He rejected the suggestion of the majority that the union should be limited to an appeal to the public "at greater expense" over the radio or in the press.

Justice Reed, in a separate opinion, was unable to see how the Ritter case differed from the other case decided the same day, the Wohl case, in which the Court had unanimously set aside a New York injunction. In that case a union attempted to persuade milk distributors who did their own work seven days a week to employ a union driver as a relief man one day a week. The union picketed the manufacturers who sold the milk to the distributors and the customers to whom the distributors delivered the milk. The New York courts had reached the conclusion that no labor dispute within the meaning of that state's anti-injunction law was there involved. The Supreme Court could not question the conclusion, but held it was of no consequence. Justice Reed, speaking for the majority in the Wohl case, said that the state could not restrict freedom of speech since there had been neither violence nor threat of violence and the repercussions on strangers were slight. Justice Douglas, while agreeing with the result reached, feared that the opinion of the majority of the Court might be interpreted to mean that peaceful picketing would be allowed when ineffective but that it might be restricted when it proved effective. He recognized, however, that regulation of picketing was permissible in order to prevent abuses, since peaceful picketing involved not only an expression of opinion but also something more. Justices Black and Murphy joined with him.

In two later cases, also coming from New York, the Supreme Court, this time unanimously, set aside state injunctions against all picketing. In one of these cases the highest state court had upheld the injunction because the original owner had made all his employees partners and because certain statements in the signs the pickets carried were false; the

second case involved only false signs. In neither case had there been any violence. Mr. Justice Frankfurter wrote a single opinion covering both cases. He said "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." Finding that there had been no abuse of the right of peaceful picketing, the Supreme Court set the injunctions aside.

One interesting case failed to get to the Supreme Court because the constitutional point had not been raised properly in the state courts. Suit was brought in New York to enjoin members of a musician's union and a stagehand's union from picketing theaters at which an opera company was using phonograph records instead of living musicians. The state judges differed sharply. The trial court granted an injunction; the first appellate court set this aside by a vote of 3–2 as an interference with the right to stop work; the highest court, by a vote of 4–2, reinstated the injunction. The majority took the view that the objective of the unions—the replacement of "canned" music by live musicians—was not lawful, especially since the musicians induced the stagehands to join with them "to destroy the business of the plaintiff." The minority expressed the opinion that it was not proper for courts to pass such a judgment on an economic controversy carried on peacefully and denied that the purpose of the unions was to destroy the plaintiff's business.

Picketing by rival unions has especially troubled the courts because the employer is caught between two fires. The United States Supreme Court has squarely rejected the notion that this circumstance permits any disregard of the procedural provisions of the Norris–La Guardia Act or the enjoining of peaceful picketing. Does the situation change if one of the rival unions has been certified by the Labor Board and enters into a contract with the employer? In such a case it has been argued that the union which failed of certification can no longer have a labor dispute with the employer, since the latter is bound to

respect the contract with the certified union. This argument has been accepted by at least one federal judge.

In New York the highest court, the Court of Appeals, ruled in two 4–3 decisions that the state anti-injunction law did not prevent the courts from enjoining the unsuccessful union at the instance of an employer who had signed up with the certified union. The dissenting judges believed that the constitutional guaranty of free speech prevented the enjoining of peaceful picketing. The Supreme Court refused to review one of these cases.

So the matter now stands. Future cases will no doubt clarify some of the uncertainties. Moreover, the replacement of Justice Byrnes by Justice Rutledge in 1943 has changed the balance in the Court and may result in some withdrawal from the position taken in the Meadowmoor and Ritter cases.

The Strike

The right to strike is fundamental to the functioning of organized labor. It has seldom been abolished by law, but judges have often enjoined strikes on the ground that they were called for illegal purposes or carried on by illegal means. This is not the place to discuss the peculiar results achieved, nor the reasoning by which judges have justified their acts. The Senn case will serve as a sample. The union involved in that case had a rule which forbade an employer from working himself at his trade. To enforce that rule the union called a strike. The state courts refused to grant an injunction, relying on an anti-injunction law recently passed. The United States Supreme Court rejected the employer's contention that the statute and the state court's action under it deprived him of property without due process of law, but the Court divided 5–4. The majority, led by Justice Brandeis, believed it to be perfectly legal for a union to call a strike under such circumstances; the minority, composed of the four conservative judges of that time—McReynolds, Van Devanter, Sutherland, and Butler—reached just the opposite conclusion.

There are some laws that bear directly on the right to strike. The National Railway Labor Act, for instance, provides for a "cooling off" period after a dispute has arisen, during which there may be no strike and mediation and arbitration must be attempted. But the arbitration there provided is not binding on the union, not "compulsory arbitration." The latter type was attempted a generation ago in Kansas, but held unconstitutional at the instance of industry in so far as it attempted to regulate wages and hours of work. While no attempt was made to enforce the compulsory arbitration provisions of the law against unions, the law still survived to some extent as a weapon against strikers. Under its provisions the calling of a strike to enforce the wage claim of a single employee was enjoined. Such a strike, said the Supreme Court, was illegal, amounting in effect to coercion.

It is generally supposed that no law will be sustained by the Supreme Court which forces people to work or penalizes them for not working. That would be a form of involuntary servitude, forbidden by the Thirteenth Amendment. There is a difference, however, between compelling an individual to work and restraining a union from calling a strike. While the individual cannot be forced to work against his will, it does not follow that he has a constitutional right to act in concert with others to stay away from work.

These observations have no relation to the war power of the federal government. It is generally supposed that men could be ordered to work for the war effort just as they can be ordered to fight.

Regulation of Unions

Ever since the Wagner Act gave legal sanction to union status, there has been persistent demand for legislation which would curb some of the powers thus acquired by organized labor. Such proposals are often put forward under the guise of "equalizing" the one-sidedness of that law. It is said that there should be a tribunal to pass on improper practices of

labor, as the Wagner Act set up the Labor Board to pass on "unfair labor practices" of employers. It should be noted, however, that well-settled legal principles have always afforded employers ample protection against any wrongs done by labor: for acts of violence there are the criminal courts, for injuries to property the remedy of injunction. These are means more prompt and compelling than the Labor Board procedure which lends itself to long drawn out hearings and at the end is not enforcible until after further litigation in the courts. Even then, the union cannot enforce the Board's order by civil suit or criminal sanctions. Only the Board can act and its only remedy is to ask the court to punish an employer for contempt. Truly there is still no equality for labor, much less any need for new legislation to create equality for the employer. Nevertheless, Wisconsin recently heeded the demand. Its Employment Relations Board has issued orders against unions as well as against employers, and these orders have, thus far, been sustained by the Supreme Court.

There is one respect in which there may be need of regulatory legislation. That is in the relations betweeen the union and its members. There have for a long time been isolated complaints about arbitrary actions of labor leaders against union members critical of their policies, of suppression of free speech within unions, of denial of effective franchise to members. There are unions which have held no elections for long periods of time. And even when regular elections are held, it is very difficult for a minority to be effective; union elections are not unlike those of large corporations in which the management generally is able to perpetuate itself in power. Moreover, many unions have policies which exclude qualified workers. Some discriminate against Negroes; others charge unreasonable initiation fees.

Among the suggestions offered to remedy the difficulties is the incorporation of unions. This project was debated more than a generation ago by Louis D. Brandeis and Samuel Gompers. It is doubtful, however, whether incorporation of

unions would be of much benefit to the members or really make the unions more responsible to the public. Without incorporation a union and its members can be sued if it does wrong; witness the Danbury Hatters case in which the homes of scores of union members were sold to pay a huge judgment obtained by the mill owners. Indeed it may turn out that incorporation will lessen rather than increase responsibility, for that has been its effect in the business world.

With the reaction against labor that ensued during the Second World War, various states passed laws compelling the incorporation of unions. One of these has been declared unconstitutional by the judge of an inferior court on the ground that it was an interference with the right of assembly.

Another suggestion is that unions be compelled to account to their members. On its face this seems appropriate enough. Surely a member of a union has the right to know how the money he and his fellows have contributed has been spent. Many unions do circulate and even publish detailed financial statements. While there can be no serious objection to requiring this of all well-established unions, a newly organized union might find itself embarrassed by a requirement that it exhibit the poverty of its resources. Knowledge of the facts might well be useful to an employer anxious to destroy the union.

Less controversial are the suggestions that union constitutions be required to conform to certain standards of decency. Years ago, when there was great public dissatisfaction with life insurance companies, most of the states prescribed the form which life insurance policies must take so as to protect the policy holders from pitfalls. In similar fashion, laws might properly be enacted which would compel unions to adopt constitutions that give the rank and file members adequate protection. Members must be guarded against arbitrary loss of membership. Their right to criticize and, in extreme cases, to expose their leaders should be guaranteed. Some provision for regularity of elections is essential. Finally, a union should

not be permitted to exclude persons because of race or religion nor, when it has a closed shop contract, to exclude any qualified worker.

Whether a union which fails to conform to these various standards should lose the right to be a bargaining agent under the Wagner Act and similar state laws is not so clear. So old a friend of labor as William H. Davis, Chairman of the War Labor Board, has urged that recalcitrant unions be denied that right. Other friends of labor believe that so drastic a penalty would punish the innocent instead of the guilty. They recommend instead that the leaders be criminally punished if they fail to conform to the new standards which may be set up by law. On the other hand, there are some who would go further and deny to misbehaving unions even the right to complain of wrongdoing by employers. Surely this is a wholly unnecessary penalizing of the innocent. It is important that any legislation dealing with union practices should be so framed that it will accomplish its objectives of protecting the union member and the public without impairing the effectiveness of unions as instruments for securing justice to the worker.

How Rights Are Vindicated: Habeas Corpus

THE Constitution contains no provision for the vindication of the various guaranties we have been discussing unless it be the writ of habeas corpus. As we shall see, this very valuable procedural device serves but a limited purpose. Although many constitutional rights are affected in criminal prosecutions, ordinarily vindication can be gained only by appeal to the United States Supreme Court. No right of appeal is guaranteed by the Constitution, nor has the Court found it necessary to declare the existence of such right of appeal essential to due process. But a person who is concerned over possible denial of constitutional right need not wait until he finds himself enmeshed in the criminal law. In certain situations he can take the initiative and test the validity of a challenged law or regulation by a suit for an injunction to prevent a threatened wrong or an action for a "declaratory judgment"; that is, he may demand a judicial determination of his right in advance of a head-on collision with the law. Or he can sue for damages after he has been wronged.

When all else fails, relief may be possible by habeas corpus. This remedy is available when none other exists, either because of denial of the right to appeal or because a person is detained without being given a trial at which to challenge the attack on his liberty. As Chief Justice Hughes has said:

> It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.

The Remedy of Habeas Corpus

As its name implies, the writ of habeas corpus is a judicial process by which a person who restrains another of his liberty is compelled to produce the "body" of the detained person in court, so that the court can pass on the legality of the detention. This right to have the detention of an individual tested judicially is of ancient origin; it probably antedates even the Magna Carta and is traceable to Roman law. It was first employed in disputes between private persons, a use which continues today, although it lies outside the scope of this study. Apparently habeas corpus was not used to test detention by public authority until the reign of Henry VII. Thereafter royal attempts to evade judicial scrutiny of illegal arrests were abetted by compliant judges, notably in the reign of Charles I.

Legislative attempts to correct these abuses resulted in the usual battle between the legislature and judges hostile to its purposes. Finally Parliament, prompted by judicial support of the king's arbitrary commitment of one Jenkes for having made a critical speech, enacted the law of 1679, which definitely secured the right of habeas corpus. The American colonists were quite familiar with executive desire to prevent scrutiny for illegal arrests and with judicial complaisance. They accordingly sought to render it even beyond the power of the legislature to restrict habeas corpus except in the special emergencies of rebellion or invasion, and thus provided in the original Constitution:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.—Article I, Section 9.

The Constitution is explicit on *when* the writ of habeas corpus may be suspended, but silent on *how* it may be done. Controversy on this subject raged during the Civil War when President Lincoln suspended the writ and directed his Army commanders to ignore judicial attempts to enforce it. Chief

Justice Taney of the United States Supreme Court, while sitting alone on Circuit as Supreme Court judges often did then, ruled that the President alone had not this power. But the military ignored this decision and shortly thereafter Congress authorized the President to suspend the writ under certain conditions.

Since the Civil War there has been no attempt to suspend the writ in the continental United States. In Hawaii, however, where martial law had been declared after Pearl Harbor, the civil governor, with the approval of the President and under authority of the Organic Act of the Territory of Hawaii, suspended the writ of habeas corpus. The military governor then issued an order forbidding any judge to issue such a writ. Early in 1942 an attempt was made to challenge the detention of one Hans Zimmerman, a naturalized citizen, by military order after a hearing before a board, but without any judicial inquiry. Judge Metzger refused to issue a writ of habeas corpus solely on the ground that the military governor had forbidden such action, saying: "the Court is under duress by reason of the order, not free to carry on the functions of the court." The Circuit Court of Appeals for the Ninth Circuit affirmed, with one judge dissenting. Then, as the case was about to be taken to the Supreme Court, Zimmerman was sent to San Francisco and released, so that case became moot.

In the summer of 1943 proceedings were instituted on behalf of two other interned persons. Although martial law had by then been somewhat relaxed, the military governor continued the prohibition against the writ of habeas corpus. This time Judge Metzger issued the writ. The commanding general refused to obey it. Conflict was avoided by the removal of the interned persons to the mainland, and their release there.

Although the provision of the Constitution regarding habeas corpus applies only to writs issued in federal courts and not to those applied for in the states, all the state constitutions have similar provisions. Moreover, if a claim is asserted under the

federal constitution, a writ of habeas corpus may, in exceptional cases, be obtained in federal courts, even though the original proceedings took place in the state courts.

The writ of habeas corpus may be used to test any detention, even one by private persons. It is the usual means by which the custody of children is brought before the courts and it has also been used by a husband to get his wife away from parents who, disapproving of his marriage, held her at home.

But the important function of the writ of habeas corpus is to afford a method whereby a person can challenge his detention by public authority. The uses of the writ are limited, however; it cannot serve to prevent a trial on criminal charges properly preferred and it cannot serve as a substitute for appeal after conviction.

The clearest case for the use of habeas corpus occurs when a person is held by the police or by some other public authority without any charge having been lodged against him. Unless the authorities make a charge, the writ must issue and the person detained be released.

Even after a charge has been lodged against an arrested man, its sufficiency can be tested by habeas corpus. The jurisdiction of the particular court to try the offense charged can be so challenged. Also, if the facts show that no offense against the law has been committed, a person held in custody can obtain relief by habeas corpus. Generally, if a grand jury has found an indictment, neither the sufficiency of that indictment nor the constitutionality of the law on which the charge is based can be tested by the writ of habeas corpus. Here the rule is applied that habeas corpus should not take the place of the trial. Appeal in case of conviction is therefore considered the appropriate remedy. In so far as this rule prevents early testing of the constitutionality of a law, it is an unfortunate one; if the law in question is unconstitutional, it seems unjust that there should have to be a trial and the stigma of conviction. On the other hand, much delay would no doubt

ensue if every person accused of crime could raise constitutional questions before trial.

Ordinarily, habeas corpus cannot be employed as a substitute for appeal after conviction. Yet there are exceptions, as when the original decision was void or there are special circumstances requiring the issue to be heard summarily. The Supreme Court approved the use of habeas corpus as a short cut in order to settle doubt concerning the jurisdiction of state or federal courts over criminal offenses committed in certain national parks. Furthermore, an appellate court may itself issue the writ of habeas corpus to take the place of the ordinary appeal where there is a fundamental question which can dispose of the entire case, such as the right to waive a jury trial.

It is more difficult to determine when the proceedings at the trial have been so contrary to established procedure that the trial can be considered void and habeas corpus used after conviction. This has been attempted in a number of famous cases. After Leo Frank was convicted of murder in Georgia, he claimed that his trial had been so dominated by mob hysteria that it became a sham. Over the dissent of Justices Holmes and Hughes, the United States Supreme Court held that the lower federal court had properly refused to issue a writ of habeas corpus.

A few years later the Supreme Court reached a contrary conclusion in Moore v. Dempsey. In that case the Court, by Justice Holmes, reversed the dismissal of a writ of habeas corpus by a lower federal court. Negroes convicted of murder in the state courts of Arkansas claimed that the killing of a white man in a fight with Negroes had caused great excitement, resulting in the shooting of many Negroes and the killing of another white man (it was with this latter killing that those convicted had been charged); that the press characterized the disturbances as a deliberately planned insurrection; that, but for the presence of U.S. troops, the defendants would have been lynched; that the trial court was thronged with a threat-

ening crowd, counsel were prevented from conferring with the accused or getting witnesses, the trial lasted less than an hour, and an impartial trial was impossible. Resort to the Governor had proved futile, many groups protesting that the mob had been promised that the law "would take its course." Attempts to obtain relief by way of habeas corpus in the state courts had failed since these claimed they had no jurisdiction. Justice Holmes ruled that under these conditions no federal judge could avoid the responsibility of deciding the facts for himself, for if they were true the convictions were void.

This class of cases also presents the very troublesome question of the extent to which a person convicted in state courts must exhaust his remedies in those courts before appealing to the federal courts to intervene by habeas corpus. In Moore v. Dempsey, application had been made to the courts of Arkansas and refused; in the later Mooney case application was made to the federal courts directly. Consequently the Supreme Court refused to issue the writ, though recognizing that if the facts alleged by Mooney were true, he should be set at liberty. Mooney was thus relegated to the courts of California, whose officials he had charged with convicting him on perjured testimony. When California rejected his contentions the Supreme Court declined to review.

This rule, that a federal court will not issue a writ of habeas corpus to consider the validity of a conviction in a state court unless all state remedies have been exhausted, is understandable in view of the necessarily delicate relations which exist between state and federal governments. But it places the convicted person at the mercy of the very courts whose fairness he is attacking. For these courts are likely to reject claims that they have been unfair. With a decision on the facts then standing against the convicted person, he is usually blocked in any attempt to get the United States Supreme Court to review.

One ground for voiding a conviction, which has recently produced a good deal of litigation by way of habeas corpus,

is the right to be represented by counsel. In the federal courts denial of counsel voids a conviction on account of the precise requirement of the Sixth Amendment on this subject. In the state courts conviction despite denial of counsel is void under the United States Constitution only if it appears that the defendant has been prejudiced.

While the constitutionality of a law cannot ordinarily be challenged by habeas corpus after conviction, state practice may permit a challenge in that manner. Angelo Herndon thereby escaped the chain gang in Georgia. Convicted of inciting to insurrection, he vainly sought redress on appeal to the United States Supreme Court. Then his attorneys obtained a writ of habeas corpus in the state court to raise the constitutional issues which had not been properly raised on the appeal. This time they obtained a decision on the merits from the United States Supreme Court in their favor. The Supreme Court has indicated, however, that when the constitutional point might have been raised at the trial in the state court and was not, then the state need not permit the convicted person a second chance to raise it thereafter by writ of habeas corpus.

The foregoing examples of the use of habeas corpus show, for the most part, situations in which the writ was used either as a short cut in advance of trial or as a relief from a trial improperly conducted. There are also situations in which habeas corpus is the only remedy available. If an attempt is made to challenge an order sending an accused person for trial to a foreign country or a distant state, habeas corpus is the only available method of redress. Yet habeas corpus has a limited value at best in proceedings such as these, for the courts will not pass on the validity of either the indictment or the statute involved.

The writ of habeas corpus remains the classic method for obtaining release on bail or reduction of excessive bail. It is used also to test such forms of non-criminal detention as deportation and internment. In the latter case the only question

which can be judicially reviewed is whether the applicant is or is not an enemy alien. If he is, the discretion of the authorities will not be reviewed. In deportation cases the courts will pass on the constitutionality of the law under which deportation is attempted, on the sufficiency of the evidence that the particular person comes within the law, and on the fairness of the hearings.

A commitment for contempt by a court or a legislative committee may be reviewed by habeas corpus if the proceedings were void for lack of jurisdiction. Where a person is detained under quarantine regulations or as insane, habeas corpus is again the appropriate method of redress.

Habeas corpus is useful also to challenge military rule under various circumstances: as to test induction into the army, to review detention by military authority, to review conviction by a military tribunal. It may be employed to test the jurisdiction of a military tribunal before it has passed judgment. Only in rare instances, however, will the courts review induction into the army. Clear violation of law or arbitrary action by the draft board must be shown before a writ will issue. That was the rule adopted after the 1917 Selective Draft Act and it was adhered to under the 1940 law. But if a boy who has volunteered is so young that his parents' consent is required, the parents can use the writ to get him released from the army.

There can be no relief by habeas corpus unless there is actual detention. An order to an officer that he stay in his quarters cannot be reviewed on habeas corpus nor can an order requiring civilians to observe a curfew. In such situations there can be no redress until there has been an interference with liberty, following a violation of the order given.

It is unfortunate that the use of the writ of habeas corpus is so circumscribed with doubts and technicalities, although some of the restrictions to which we have referred are desirable in the interest of an orderly administration of justice.

Remedies Other than Habeas Corpus

Constitutional rights also can be vindicated in lawsuits for damages, for an injunction, or for a declaration of rights. For none of these is there specific provision in the Constitution. But since Article III, Section 2 provides that "the judicial power shall extend to all cases . . . arising under this Constitution," there is at least a basis in the Constitution for Congressional legislation giving federal courts the right to pass on constitutional issues. Indeed, it may be that this section of the Constitution requires Congress to make provision for access to the federal courts in all such cases.

The provision which Congress has made is, however, somewhat limited. Suits can be brought in the ordinary federal courts to test the validity of federal laws or regulations only if the amount "in controversy" exceeds $3000. An attempt to challenge the validity of the law banning Communists from the W.P.A. failed because the plaintiff was unable to show that the requisite amount was involved. In such cases where the amount is less than $3000 suit must be brought in one of the local courts of the District of Columbia. This is a great hardship on litigants in distant parts of the country. There are, moreover, many cases in which the amount involved exceeds $3000 which must nevertheless be brought in the District of Columbia because of the necessity of suing a government official residing there. Thus suits to test Post Office orders banning books or periodicals from the mails must be commenced there because the Postmaster General issues the order which is to be tested.

When the question involves a test of state or municipal action, Congress has recognized the importance of allowing the suit to be brought in the place where the plaintiff resides. In this class of cases there is no requirement that any particular amount be involved. This was definitely established by the Supreme Court decision upholding the injunction obtained

by the C.I.O. which prevented Mayor Hague of Jersey City from interfering with its right to hold meetings and from "deporting" its members beyond the city limits.

Suits brought in federal courts for an injunction against the enforcement of a statute on the ground that it is unconstitutional, whether it be a federal or a state law, must be heard before a special court of three judges. Such a court may not be convoked if the attack on the law lacks substance, if the attack is not the basis of the suit itself but merely of a defense to an ordinary lawsuit, or if the attack is upon the manner in which the law is being administered and not on the law itself. When the case calls for such a special court, its decisions are directly reviewable by the Supreme Court without the necessity of passing through any Circuit Court of Appeals.

But federal courts will not always consider attacks on the state laws. As in the use of the writ of habeas corpus, there is a tendency here to require a litigant to exhaust his remedies in the state courts. A special reason for this, when the question involves the constitutionality of a state law, is that the state courts have the last word on the interpretation of their own laws. The highest court of the state may so interpret a particular law that the constitutional question urged by the prospective litigant in the federal courts would evaporate. This rule is most generally observed when the attack is upon a state criminal law and prosecutions are actually pending in the state courts. In such a case the litigant can, as defendant in these prosecutions, make any constitutional arguments he desires. If convicted and ultimately unsuccessful in the highest court of the state, he can ask the Supreme Court of the United States to review his conviction.

This is a cumbersome procedure, to be sure, involving the necessity of standing trial for crime, the ignominy of conviction, the delay of many appeals. Moreover, it has the disadvantage of leaving to the state courts the determination of the facts. Often important constitutional issues can be bypassed in this way. For example, a decision on an important free speech

question can be avoided by a finding that the defendant obstructed traffic or made threats or committed some act of violence. The evidence in support of such a conclusion may be of the flimsiest. Yet if there is any basis for it, the United States Supreme Court will not intervene. It is powerless to review the facts as found by a state court, except where it feels that there is no basis at all for them or the question is rather one of inference than of fact. For instance, the Supreme Court in the Scottsboro case rejected findings of the Alabama courts that state jury commissioners had not discriminated against Negroes in the selection of jurors. And in several cases the Supreme Court has decided that confessions were obtained by improper methods, though the state courts had reached a contrary conclusion.

Original suits in the federal courts will be permitted, however, when serious harm would otherwise result. Such suits have been allowed when earlier state decisions had indicated a disregard for proper constitutional principles, when many state suits could thus be avoided, when the state made it difficult to have the issue determined in its courts. In the Hague case, for instance, federal jurisdiction was sustained because it was established that the Jersey City police hustled people out of the city instead of arresting them, thus rendering it impossible to test the validity of the challenged ordinance in any criminal prosecution brought under it. The Supreme Court clarified this question in the Douglas case, decided in May 1943, which held that a federal court should not enjoin the enforcement of a municipal peddling ordinance at the instance of several witnesses of Jehovah because prosecutions under the ordinance were already pending.

One other method of implementing the constitutional guaranties remains at the disposal of the citizen if he can secure the co-operation of the local federal attorney or of the Department of Justice. That is a criminal proceeding under one of the various laws passed by Congress for the protection of civil rights such as the original Enforcement Act of 1870. However,

their usefulness is limited, since the Supreme Court long ago ruled that persons could not be punished for acts which merely infringed rights inherent in state citizenship. A prosecution for conspiracy to interfere with free speech could not be maintained in a federal court unless it appeared that a federal subject was being discussed by the persons interfered with. On the other hand, it is easier to proceed under this law against officials of a state. That was successfully done in Arkansas when a number of enforcement officers and a jail keeper were convicted for having innocent people arrested in order to extort money from them. In affirming these convictions the Circuit Court of Appeals for the Eighth Circuit held that the due process clause insured the right to be free from arbitrary arrest caused by state action; therefore, it was within the power of Congress to punish state officers who violated the right. State officers have also been tried under this law for permitting a Negro to be lynched, though they were acquitted by the jury.

In brief, judicial action can be taken to punish official wrongdoers, to prevent arbitrary action by them, and to set aside convictions where basic rights have been denied.

The Role of the Courts

All officers of government are sworn to uphold the Constitution. It is therefore the duty of legislator, administrator, and judge alike to respect and enforce all its provisions, those guaranteeing civil liberties no less than others. We have been chiefly concerned with judicial condemnation of arbitrary executive or unconstitutional legislative action. That is natural since no record is made when civil liberties are respected. It is only when complaints are registered that the scope of the guaranties contained in the Constitution can be tested. Since judges are the customary arbiters of controversy, it is not strange that they have acted as such in this field. At least as concerns review of administrative action, the framers of the Constitution must have expected this for they were familiar with

English precedent resulting in judicial condemnation of unlawful acts by officials, notably in the Wilkes cases which declared general warrants to be void. There was no such English precedent, however, for similar judicial scrutiny of legislative acts. Around the power of American judges to declare legislation unconstitutional a storm has raged since the submission of the Constitution for ratification.

The Constitution gives no express power to the judiciary to override an act of Congress. Admittedly, it forbids Congressional action in various respects and declares that the courts shall have power to determine all questions arising under the Constitution. From this it was argued that implied power was given to the courts to declare unconstitutional what is expressly or even impliedly forbidden by the Constitution. In Marbury v. Madison Chief Justice Marshall accepted this argument. His successors have never abandoned the position then taken, although in our early history the power so asserted was seldom exercised. To this day, however, there are many who insist that this power is usurpation, that in a democracy the elected representatives of the people, not an appointed judiciary, should have the last word on what the Constitution means.

There can be no doubt that the way in which the judiciary exercised its supervisory power over legislation during most of our history was contrary to the aspirations of the masses of the people. Most of the constitutional decisions favored property interests, commencing with the Dred Scott case in 1857 and continuing down to the minimum wage case in 1936. It was natural that this should be so, not only because judges are usually drawn from a group noted for its defense of property rights, but because, for the greater part of our history, property interests have been in control of government. We are not here concerned with the general subject of government by judiciary, but only with the way in which it has worked in the field of civil liberties.

The plain answer is that it has worked very badly. The same

courts that were astute to find opportunity to use their power in aid of property were niggardly in using it to prevent discrimination against the Negro or for the protection of freedom of expression. The Supreme Court of the United States was no exception. For the greater part of its history it has narrowly construed the great civil liberties guaranties of the Constitution, avoiding decisions which might have given these effective power by reliance on technicalities and legalisms, for a long time even rejecting the broadened conception of the due process clause which it had developed in order to bring under its scrutiny state laws restrictive of property rights. It was not until 1925 that a breach was made in this one-sided approach, and then in a case in which the Court upheld the challenged state law.

Nevertheless, after the appointment of Charles Evans Hughes as Chief Justice a change occurred which has, in the main, continued under his successor, Harlan F. Stone. Almost all the decisions of the Supreme Court favorable to civil liberties which we have discussed in this book were handed down after 1933. Ten years, however, is too short a time in the life of a nation to assure a trend. Encouraging as the current attitude of the Supreme Court may be, we must not be blinded to the possibility that in the future, as in the past, new judges may bring new views, that the pendulum may swing back and our liberties be narrowed by judicial decision. The Court showed some indication that such a process might be under way in 1942 and 1943 when it divided sharply in many civil liberties cases. Indeed, only the accident of the resignation of one judge and the appointment of a liberal successor saved the day for civil liberties in one group of cases.

It must be remembered also that in a field such as this, which affects the poor and lowly, even favorable Supreme Court decisions do not always mean the elimination of the condemned practice. When the Court declares that a tax law is unconstitutional, no one is thereafter required to pay the tax; in that field obedience to the judicial determination is

practically automatic. But when the Court voids a conviction because Negroes have been excluded from jury service or confessions have been obtained by torture, there is no guaranty that such practices will cease. So it is important not only that the Supreme Court render favorable decisions but that local administrators be chosen who are equally concerned with democratic processes. Only on a consistently broad front can civil liberties be preserved. To rely on the judiciary alone is to lean on an uncertain reed.

Who May Raise Issues

It is well settled that not everyone has standing which permits him to raise constitutional issues. Only those whose rights are directly infringed may complain. So, as we have seen, one man cannot object to the use against him of evidence illegally seized from another, or of information obtained from the tapping of another's telephone wires. In 1943 the Supreme Court refused to consider the constitutionality of a Connecticut law forbidding dissemination of birth control information, on the challenge of a doctor who complained that, if the law applied to him, some of his patients might die because he could not give them proper advice. Curiously, the doctor did not claim that his own right of free speech had been infringed.

Some Uncharted Areas

WHILE the Bill of Rights was designed to protect the citizen against the despotic tendency inherent in all government, it naturally did not cover all possible problems. Some issues that were overlooked no doubt existed in the eighteenth century though their importance was negligible; others have developed out of an expanding industrial economy. No definite conclusions have yet been reached concerning the solution of some difficulties which have arisen. These relate, in the main, to the selection and dismissal of public employees, to investigations by legislative committees, and to controls over business exercised by administrative agencies. In addition, the increasing interference by government with private industry has raised the question of what would happen to our liberties should the government take over large sections of industry, with some form of collectivist society developing.

Government Employees

Often the question arises whether a person's freedom to express himself can properly be limited because he is employed by the government. The problem occurs in two contexts: in connection with applications for employment and in connection with possible dismissals. In justification of restrictions on the free speech of public employees it has been stated that although a person has a constitutional right of freedom of speech, he has no such constitutional right to be a policeman. The statement, however, has greater merit as an epigram than as an exposition of the Constitution. While some restriction on

the freedom of expression of public servants may be permissible, at least when the performance of their duties so requires, there can be little doubt that the Constitution assures the right of freedom of speech to public servants as well as to the general public.

Nevertheless, it is not unusual for applicants for public service to be rejected on account of their views. And individuals already on the payroll are occasionally dismissed because of their opinions or affiliations. Sometimes this happens because the legislature has laid down conditions of employment, sometimes on the initiative of the employing authority alone, sometimes because of pressure from outside sources.

There can be no doubt that both Congress and the state legislatures have the power to lay down standards of fitness for public service. The difficulty arises when an attempt is made to declare that persons of certain views are unfit. Thus Congress has forbidden the employment of "Communists" on work relief projects, but a federal judge ruled that this classification was too vague to form the basis of proper legislation. New York bars persons who advocate the overthrow of the government by force. That, at least, is a standard which is capable of reasonable application, although no test has yet arisen under that law.

In many instances the appointing authority or civil service commissions exercise a veto power over applicants for employment which cannot be checked. In the course of investigation and interview, many questions are asked concerning the applicant's views on controversial issues. It is almost impossible for a rejected applicant to isolate these questions and show to the satisfaction of judges that his rejection was actually caused by antagonism to his views.

Moreover, it must be recognized that to some extent the views of an applicant for public employment may be relevant. From time immemorial it has been the custom of the party in power to give employment primarily to its supporters; despite civil service reform, which has restricted the power

of the new to get rid of the old, it is still recognized that policy-making positions are properly the spoils of the party. How else can a new administration see to it that its views, presumably ratified by the people at the polls, will be carried into practice? All this is ancient and familiar history. Hence no one can object that his freedom of expression is interfered with because a new administration dispenses with his services on account of his avowed sympathy for the ideas of the old.

But what shall we say of a legislature which tries to force administrators to get rid of satisfactory public servants merely because the opinions or affiliations of these servants are disliked by the dominant legislative clique? The true motive of the legislature is masked behind the contention that the particular individual is subversive, although the standards of subversion are vague and uncertain. Any activity is deemed subversive which seeks far-reaching change, as the advocacy of universal suffrage was once deemed subversive in Scotland.

This subject received much prominence in 1942 and 1943 because of the activities of the Dies Committee of the House of Representatives, followed by the investigations of the Kerr Committee which recommended the discharge of certain employees from the federal service through the device of prohibiting the use of any appropriated money for the payment of their salaries. The Kerr Committee laid down a standard which branded persons as subversive whose conduct is "inimical to the government" or "impedes its projects" or "lessens its efforts," and characterized as such conduct membership in or affiliation with an organization having such aims. The threat to freedom of expression involved in this vague standard was, moreover, increased by the fact that no real attempt was made to determine whether any particular organization did advocate objectionable doctrine. Expression of sympathy for Soviet Russia, advocacy of far-reaching changes in capitalist society, or the substitution of a socialist economy figured largely in the conclusions reached. The most amazing case was that of Professor Robert Morss Lovett, then Lieutenant Gov-

ernor of the Virgin Islands, whom the committee branded as subversive, in part because he had once voted for Norman Thomas, had been an editor of *The New Republic,* and had been affiliated with the American Civil Liberties Union and the American Birth Control League.

Not only were these proceedings based on definitions so vague as to be worthless, but the hearings ostensibly afforded the accused individuals were wanting in all elements of fair play. Those accused had no opportunity of facing their accusers, were denied counsel, were heard behind closed doors, and had no way by which they could present their side of the case to the House of Representatives which presumed to judge them.

It was disheartening that in the House only a handful of members protested this legislative lynching. While the heads of the agencies involved loyally stood by their employees in these instances, such has not always been the case. One of the most unfortunate aspects of this kind of pressure is the ease with which many high government officials fall in line so as to avoid trouble. It is fortunate that President Roosevelt indicated his opposition to this Congressional interference with his right of appointment, but discouraging that he did not denounce the false standards set up and the star chamber procedure followed.

It must be borne in mind that even when an employee is dismissed in strict accordance with the law, he seldom gets an adequate hearing or a judicial review. In some states civil servants have tenure, but even then they do not get a hearing. For the law generally requires only that the charges be in writing and that the employee be given an opportunity to make an explanation by way of defense. That means merely that he can make a written reply to his superior. He has no opportunity to cross-examine witnesses, to have the assistance of a lawyer, to pit his credibility against that of his accusers, or to obtain review in the courts.

Some favored groups have won these privileges, such as the

teachers, policemen, and veterans in New York. In the federal system the law requires no administrator to give an employee a hearing and judicial review is practically non-existent. However, some enlightened administrators have set up machinery for hearings which fully protects the rights of employees and insures that none may be dismissed without a fair hearing.

Legislative Committees

There has been much dissatisfaction with the manner in which legislative committees conduct their hearings. This stems in part from the opposition of persons hostile to the purpose of the hearings. But it also rests on practices which have developed over a period of years and which are subject to grave abuse. It must be remembered that a legislative inquiry is a one-sided affair, much like a grand jury investigation, with the great difference that it is conducted in public. Witnesses called before legislative committees have no right to counsel, though in many instances the committee allows them that privilege. Persons called to testify have no right to produce evidence of their own. Moreover, people are often called to testify in secret, without being given a copy of their testimony or an opportunity to check it. Then they may be called at public hearings to be confronted with the minutes of the private ones, often incorrectly recorded. The chief grievance, however, is that a person cannot testify when he wants to do so. He may have been maligned by the testimony of others and have suffered from wide publicity given it by the press. Yet he can do nothing to protect himself beyond making a statement which the press is likely to ignore.

Nevertheless, there are serious difficulties in the way of relieving these shortcomings. To conduct a legislative inquiry as though it were a trial would soon destroy its usefulness. It is essential that the committee be free to develop the story it wants to unfold without delay and complication. To allow witnesses to have lawyers, to allow accused persons to intrude upon the hearings, even to give witnesses transcripts of their

testimony taken in private, might seriously obstruct the inquiry. To take this last point, often the lawyer for the committee accumulates his evidence against the person chiefly involved through information received in private from the small fry of the group. It may be important that others should not know what has already been said, lest they mold their own stories accordingly. This method of procedure has proved particularly valuable in inquiries directed at the discovery of official corruption.

Yet enough complaints have arisen over the procedure of legislative committees to call for a searching inquiry into this subject. Perhaps a committee of distinguished legislators and lawyers might explore the possibility of formulating rules for the conduct of legislative inquiries which could protect individuals from unnecessary hardship and yet not interfere with the proper functioning of the inquiry. For it must never be forgotten that much valuable work had been done by legislative committees, many abuses exposed both in public and in private life.

Perhaps the greatest difficulties have arisen when the subject to be inquired into is not well defined. A legislative committee which investigates "subversive" activities will run into much the same difficulty as the examiners of public employees who are tested by this uncertain standard. The danger always is that one may call subversive everything that one dislikes. It is important, therefore, that legislatures be cautious before they authorize inquiries in the realm of opinion, that they define the scope of the inquiry and choose the investigators with real concern for freedom of expression. Otherwise the useful weapon of the legislative committee can turn into an Inquisition or Committee of Safety. Instead of furthering the liberties of the citizen, it can go far to destroy them.

Administrative Inquiries

Grievances are not confined to legislative investigations. Many of the agencies of government have wide powers of in-

quiry—to mention only a few, the Securities and Exchange Commission, the National Labor Relations Board, the Interstate Commerce Commission, the Secretary of Agriculture in relation to various aspects of the food industry, the Secretary of Labor in relation to wages and hours. Sometimes these investigations are preliminary to charges, in which case they are one-sided and present many of the problems of the legislative inquiry, though lacking its publicity. After charges are filed, to be sure, the accused person has the right to counsel and a hearing, to cross-examine the witnesses against him and produce witnesses in his favor, and to some measure of judicial review. In this respect the proceedings are not unlike a lawsuit. Even the usual rule that the appellate court will not reexamine the facts is no different from the rule which prevails in trials.

But there is one important variation. In a criminal trial one agency of government prosecutes, another decides: never are the district attorney and the judge one and the same. Before an administrative agency, however, the situation is different. The same board or individual makes the charges and passes on them. This, it has been claimed, is a denial of basic right. The courts, however, have upheld legislative action which authorizes the same agency both to accuse and to adjudicate. The result is not so outrageous as some people think, nor so unfamiliar. In the relation between employer and employee that has long been familiar doctrine. The boss decides whether to accuse an employee of wrongdoing; the boss passes judgment on the accusation. In a large organization one individual may conduct the investigation, another hold the hearing (if one be required), still another make the decision. The same procedure holds in these various government agencies. The different functions are confided to different persons, all acting under the direction of and on the responsibility of the head. Experience has shown that this method is economical and, in the main, produces satisfactory results. This is particularly true where the agency was set up to put some par-

ticular reform into effect. Otherwise, a deciding tribunal unsympathetic to the purpose of the reform could completely wreck it.

Nevertheless, the great increase in the number of government agencies and in the scope of their powers has led those affected to press for a change. Committees to consider the subject have made divergent reports. It was recognized that no general rule could be laid down which should apply to all administrative agencies. It is apparent that further study is necessary before any valid conclusion can be reached. To the extent that the various agencies avoid even the appearance of having a prosecutor's complex and give everyone a full and fair hearing, the demand for change in the law will lose its force.

Civil Liberties in a Collectivist Society

There are many who believe that the economic necessities of the future will bring about a society essentially collectivist in form. Upholders of the present order argue, however, that our long-cherished liberties would be lost in such a society. Free enterprise and civil liberties, they say, are Siamese twins who cannot live except in indissoluble union. What is the justification for this contention?

It is clear at the outset that the period of history which has seen the greatest development of civil liberties has seen the greatest expansion of free enterprise. Modern industrialism grew out of the same revolt against despotic state power as did democratic liberalism, although industry has often rejected the democratic virtues in its own practices. But the mere fact that the doctrines of Adam Smith and those of Thomas Jefferson grew in the same soil is no proof that they are dependent on each other.

Both the businessman and the liberal want to be free from governmental restraint. That view they share from their identical native soil, but there the resemblance ends. For the libertarian desires such freedom that individuals may blos-

som, that variety of belief and conscience may find expression. The businessman wants freedom so that he can find profitable employment for his capital. Beyond that he has no care for social consequences, though there is no doubt that the community has benefited by the ingenuity and daring of the businessman, just as it has suffered from his speculative greed and wasteful processes.

Indeed, to a large degree, the interests of business and of liberalism are antagonistic. Time and again free expression has been blocked at the command of industry. This has been true not only in the company town, where semi-feudal conditions have obtained, but in academic circles and the metropolitan press. Criticism of the existing order has been discouraged, the daring and independent mind penalized. It cannot be gainsaid that for many years modern industry believed it was to its interest for the mass of the people to be docile and disorganized.

These defects in the relationship of industry to the public are, however, subject to the influence on the one hand of enlightened competition and on the other of the power of public opinion manifest in government. Even if there is a strong anti-libertarian impulse in the system of free enterprise, the argument runs, there are natural corrective forces at work. And these forces would be absent in a collectivist economy where the government would dominate the economic scene and no longer operate as umpire.

It cannot be denied that a system in which the government is the chief employer of labor lacks one of the elements of balance which makes the present system at least tolerable. This lack makes it of the utmost importance that the people retain complete control over the government so that it may remain their servant, not their master. There is no reason why this should not be possible.

In all discussions of this subject Soviet Russia is presented as an example of the consequences of collectivism. But it must be remembered that civil liberties had not existed in Russia

prior to the revolution and that it takes many years for these liberties to take root firmly. Germany's experience after the First World War is proof enough of that.

Moreover, there are many varieties of collectivism. It is not essential that economic control by the state of the basic instruments of production, transportation, communication, and credit be accompanied by a control of opinion as well. The particular manifestation which occurred in Russia was the product of its previous history and the trauma of civil war and world ostracism. There is no reason to suppose that in the United States the pattern need be the same and that the change will not be a peaceful one, should it be found desirable and necessary to vest the state with the same economic functions.

After all, the ideological basis of socialism is the development of the individual, the widening of the horizons of freedom, as well as the elimination of the profit motive. Whether these two aspirations can be accomplished together depends then on the will of the people to be free, on their active participation in all the functions of government, on their refusal to yield to intolerance, and on their ability to control those whom they place in positions of power. The task may be difficult; it should not be impossible.

We reject the notion that freedom depends on any form of economic organization. It will flourish where the common man insists it shall and only there. No socialist economy will ensure freedom, no society in which business competition flourishes has a monopoly of freedom. Freedom is the reach of the human spirit not confined or conditioned by society though influenced by all its forces. Freedom can exist even though there be no businessmen. But it cannot exist, whether or not "free enterprise" continue to function, unless men are quick to resist encroachments on their own liberty and especially on that of others.

Glossary

(The references are to the chapters in which the various topics are fully discussed)

Attainder—See Bill of

Bill of Attainder (XVIII)—A legislative enactment declaring one or more persons to be guilty of crime and inflicting punishment—usually of death or banishment. The Constitution forbids both states and federal government from enacting such laws.

Clear and Present Danger (III, VII)—A rule laid down by the United States Supreme Court in relation to prosecutions for expression of opinion. The advocacy of ideas cannot constitutionally be punished unless there is a clear and present danger that such advocacy will result in illegal action.

Confrontation of Witnesses (XVI)—A right, guaranteed by the Constitution, to have witnesses in a criminal case produced in court so that the defendant may cross-examine them.

Criminal Anarchy or Syndicalism (III, VII)—See Sedition.

Double Jeopardy (XII)—The Constitution forbids a person being tried twice for the same offense.

Due Process (XIV)—Life, liberty, and property are protected against denial of "due process"—that is against arbitrary interference by executive, administrative, or judicial officers or against legislation which fails to afford a fair hearing, has no reasonable relation to objectives within the field of legislative action, or denies any fundamental liberty guaranteed by the Constitution.

Ex post facto (XVIII)—A law which punishes an act not unlawful at the time it was committed or which increases punishment beyond that provided at the time of the act. Ex post facto laws

are forbidden by the original Constitution to both the states and the federal government.

Habeas Corpus (III, XXIV)—A judicial process which tests the legality of the detention of persons, whether by officials of the government or otherwise. It cannot be abolished except in time of invasion or rebellion.

Indictment (XI)—The method by which a grand jury determines that a person should be prosecuted for a crime of which he is suspected. In the federal courts no serious crimes can be prosecuted unless a grand jury has found an indictment.

Involuntary Servitude (XIX)—Any form of service which is compulsory is deemed the equivalent of slavery, except when for the benefit of the state—and also except service on board ships.

Martial Law (III, XXIV)—A state of emergency in which the military authorities supersede the civil authorities.

Military Law (III, XXIV)—Rules applicable to persons in our own armed services and to those in the service of the enemy who are not entitled to consideration as prisoners of war.

Peonage (XIX)—A form of forced labor ordinarily associated with working out a debt; it is prohibited by the Constitution as a form of slavery.

Privileges and Immunities (XX)—The Constitution guarantees to all citizens equality of treatment in the various states and protection against state interference in respect to those rights that are created by the federal government as, for example, the right to travel from state to state.

Sedition (III, VII)—Conduct and expression of opinion hostile to government, including advocacy of its overthrow by force or the use of sabotage, urging disaffection or insubordination in the armed forces, and impeding the success of a war.

Self-Incrimination (XIII)—The Constitution gives every person the right to refuse to give testimony that shows him to be guilty of a crime.

Authorities

(Only those authorities are listed that are specifically discussed or quoted from in the text.)

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